Debt Collection

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"It is 'as much the duty of the citizen to pay the Government as it is the duty of the Government to pay the citizen.'" Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536, 540 (1946), quoting from Cong. Globe, 37th Cong., 2d Sess. 1674 (1862).

A. Introduction

Debts owed to the federal government arise from many sources. Some examples are tax assessments; sale of government goods and services; federal housing, farm, and student loan and loan guarantee programs; and overpayments or erroneous payments to employees, contractors, assistance recipients, and annuitants. This chapter will discuss how the government goes about collecting its debts.

As with any business, if the government cannot collect amounts owed to it, it must write off the debts as uncollectible. The losses, however, do not simply disappear. The business passes its debt losses on to the consumer. The government must similarly pass its losses on to its consumer, the taxpayer. This may manifest itself in many ways—higher taxes, reduced government services, increased budget deficit, increased national debt. Thus, in a very real sense, the government owes it to those who pay their debts and taxes to try to collect from those who do not.

Before describing the magnitude of the government's debt collection activities, it is first necessary to distinguish between "receivables" and "delinquent debt." In making this distinction, it may also be helpful to divide the universe of government debt claims into two broad categories.

The first category is debts resulting from programs involving the extension of credit in one form or another. If, for example, the government makes a loan of a million dollars, it has a "receivable" or "account receivable" until the loan is repaid. If the borrower makes payments on the loan in accordance with the agreed-upon schedule,—that is, if the account is kept "current"—the creditor agency's actions with respect to that account (billing, recordkeeping, receiving and depositing payments, etc.) are called "account servicing." At least for purposes of this chapter, however, this is not "debt collection." See 64 Comp. Gen. 366, 369–70 (1985). The concept of debt collection comes into play only if and when the borrower falls behind in payments and thereby becomes "delinquent."[1] (Obviously, the debt collection phase will also include account servicing functions.) For this first category, the total amount of outstanding receivables will be much larger than the amount of delinquent debt.

[1]We use the term "delinquent" here in the broad sense of simply being in arrears in payment. As we will see later, there is a more precise definition of delinquency for debt collection purposes.

The second category is debt claims with respect to which the account servicing and debt collection phases are one and the same. Suppose, for example, an agency makes an overpayment to one of its employees. The debt comes into existence when the agency discovers the overpayment and notifies the employee. The debt is still a receivable, but debt collection commences immediately and there is no separate account servicing phase.

Now for some numbers.[2] As of the end of fiscal year 1991, total receivables owed the federal government amounted to approximately $300 billion. This amount consisted of $230 billion in loans receivable and other non-tax debts, and $70 billion in tax receivables. Much of this will be paid routinely but a sizeable portion will not, forcing the government to pursue claims against its debtors. Out of this $300 billion total, $112.5 billion was reported as delinquent. The largest single category of delinquent debt is tax debt, which accounted for $67 billion, leaving $45.5 billion of delinquent non-tax debt.

The statistics tell you different things, depending on how you look at them. Most certainly, a delinquent debt total of over $112 billion is cause for serious concern at all levels of federal management. This, in anyone's vocabulary, is "real money."[3] This, however, does not necessarily translate into the same level of concern for every program. A useful measuring device is the "delinquency rate." If you divide the delinquent debt for a particular program by the total receivables for that program, you get the delinquency rate. Comparing the delinquency rate for the same program over a period of time will give you useful trend data for that program, which may be the same, better, or worse than the overall rate.

Let us take a simple hypothetical to illustrate. Suppose this year you make ten $100 loans for a total of $1,000 in loans receivable. If one of those loans becomes delinquent, you have a delinquency rate of 10 percent. Next year, you make fifty similar loans, also of $100 each. Five of those become delinquent. You have a fivefold increase in the total amount of delinquent debt, but your delinquency rate is still 10 percent. Both figures tell you something important, but the increase in the dollar amount of delinquent

[2]Section 12 of the Debt Collection Act of 1982, 31 U.S.C. § 3719, requires the Office of Management and Budget, in consultation with GAO and the Treasury Department, to prescribe regulations for agency reporting, at least once a year, on the status of receivables. The statute also lists the types of information required. The governmentwide totals noted in the text, derived from these reports, are taken from OMB's Budget of the United States Government, Fiscal Year 1993, Part One, pages 320–322.

[3]One is reminded of the quip attributed to the late Senator Everett Dirksen—a billion here, a billion there, pretty soon you're talking about real money. Library of Congress, Respectfully Quoted ¶ 800, at 155 (S. Platt ed., 1989).

debt in this particular example may be due to increased program size rather than poor debt collection.

Delinquencies occur for a variety of reasons. We have all seen press accounts of some wealthy professional with a seriously delinquent student loan. However, it must also be kept in mind that many federal programs are intended to provide assistance in one form or another to some segment of society which the private market will not accommodate. If private credit markets were available, the federal programs would presumably not have been necessary. Delinquencies in such programs should not be surprising. In addition, changes in the economy or other factors beyond anyone's control have an impact. A severe drought will produce increased delinquencies in farm credit programs. This by itself obviously does not mean that the administering agencies are ignoring debt collection or that farmers are "deadbeats."

The point of all this is to caution against over-generalization. While it is true that debt collection is a major task for the federal government, delinquent debt occurs for a variety of reasons, and federal agencies should formulate their debt collection approaches accordingly.

GAO's debt collection philosophy stems from two key premises. First, each federal agency should have an aggressive debt collection program, taking advantage of all tools available under the law, tailored to the needs and circumstances of the particular program or case. Second, federal debt collection activities should never be unreasonable. It is frequently said that an agency's actions should always be based on the "interests of the government." While maximum recovery of amounts owed is surely one of these interests, it is not the only one. It is not the intent of federal debt collection to impoverish the citizen.[4]

B. Legal Foundation

1. The Common Law

While debt collection today is largely a creature of statute, this was not always the case. There is a common-law base to federal debt collection, much of which remains relevant. The Supreme Court has recognized that the United States, as sovereign, has the inherent right to collect debts

[4]The preamble to the 1984 reissuance of the Federal Claims Collection Standards, discussed later in the text, throughout stresses the concept of avoiding undue financial hardship. 49 Fed. Reg. 8889–96 (March 9, 1984). See also, e.g., 62 Comp. Gen. 599 (1983).

owed to it. "The Government by appropriate action can recover funds which its agents have wrongfully, erroneously, or illegally paid." United States v. Wurts, 303 U.S. 414, 415 (1938). As another court has stated:

"The only time a government agency is barred from exercising its right to recover overpayments is when Congress has clearly manifested its intention to raise a statutory barrier."

Old Republic Ins. Co. v. Federal Crop Ins. Corp., 746 F. Supp. 767, 770 (N.D. Ill. 1990), aff'd, 947 F.2d 269 (7th Cir. 1991). See also Bechtel v. Pension Benefit Guaranty Corp., 781 F.2d 906 (D.C. Cir. 1986).

The extent to which this right exists under the common law, i.e., without the need for statutory authority, has not been free from debate. At a minimum, it embraces the right to sue. Wurts, 303 U.S. at 415. See also Fansteel Metallurgical Corp. v. United States, 172 F. Supp. 268, 270 (Ct. Cl. 1959); Maryland Small Business Development Financing Authority v. United States, 4 Cl. Ct. 76, 80 (1983).

The government's common-law right to recover amounts owed to it has also been held to embrace administrative recoupment and setoff.[5] E.g., Woods v. United States, 724 F.2d 1444 (9th Cir. 1984) (food stamp program); Collins v. Donovan, 661 F.2d 705 (8th Cir. 1981) (Labor Department recoupment regulations under Trade Act of 1974); Jacquet v. Westerfield, 569 F.2d 1339 (5th Cir. 1978) (Aid to Families with Dependent Children program); DiSilvestro v. United States, 405 F.2d 150 (2d Cir. 1968) (erroneous payment of disability benefits by Veterans Administration). Also, as we will see later in this chapter, the United States has long asserted the common-law right to charge interest.

Some courts have elevated the government's common-law right to recover to the status of a duty. The argument begins with Article IV, section 3, clause 2 of the Constitution, the so-called Property Clause, which gives Congress the power to dispose of property belonging to the United States. The term "property" is not limited to tangible property, but includes legal rights as well. Thus, the Supreme Court has stated:

"Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Art. IV, § 3, Cl. 2. Subordinate officers of the

[5]Technically, "recoupment" and "setoff" are two different things. In a recoupment, both claims arise from the same transaction. In a setoff, the claims arise from different transactions. Black's Law Dictionary 1275 (6th ed. 1990).

United States are without that power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted."

Royal Indemnity Co. v. United States, 313 U.S. 289, 294 (1941).

A payment which is erroneous or illegal, it has been held, violates the Property Clause because it amounts to giving away government money without congressional authorization, and gives rise to not only a right but a duty on the part of the government to recover. The Court of Claims stated the proposition as follows in Fansteel Metallurgical Corp., 172 F. Supp. at 270:

"As a matter of fact, when a payment is erroneously or illegally made it is in direct violation of article IV, section 3, clause 2, of the Constitution. [Citation omitted.] Under these circumstances it is not only lawful but the duty of the Government to sue for a refund thereof, and no statute is necessary to authorize the United States to sue in such a case."

See also Aetna Casualty & Surety Co. v. United States, 526 F.2d 1127, 1130 (Ct. Cl. 1975), cert. denied, 425 U.S. 973; Maryland Small Business Development Financing Authority, 4 Cl. Ct. at 80.

It follows that, without a clear statutory basis, an agency has no authority to forgive indebtedness or to waive recovery. Pacific Hardware & Steel Co. v. United States, 49 Ct. Cl. 327, 335 (1914); 14 Comp. Gen. 897, 900 (1935); 14 Comp. Gen. 468 (1934); B-201054, April 27, 1981. See also B-118653, July 15, 1969. This principle applies as well to partial forgiveness without compensating benefit, such as the termination of the accrual of interest. 67 Comp. Gen. 471 (1988).

In exercising its right to recover amounts illegally or erroneously paid, the government cannot be estopped by the mistakes of its officers or agents. Aetna Casualty & Surety Co., 526 F.2d at 1130; 51 Comp. Gen. 162, 165 (1971); B-164031(1).90, December 1, 1976.

Today, many areas of debt collection are governed by statute, and to that extent the need to rely on the common law has been correspondingly reduced. Some legislation has given the government new legal authority; some has restricted existing authority; and some has served to buttress existing authority by giving it a statutory foundation. The common-law principles set forth above continue to arise in various contexts, however, and are by no means obsolete.

2. Role of GAO

GAO's role in the federal debt collection arena stems from several statutes. The first is 31 U.S.C. § 3702(a), the fundamental source of GAO's claims settlement authority. The origin and meaning of 31 U.S.C. § 3702(a) have been discussed in Chapter 12 and are no different in the debt context.

The second statute is the second portion of 31 U.S.C. § 3526(a), which authorizes the Comptroller General to "supervise the recovery of all debts finally certified by the Comptroller General as due the Government." There are no recent decisions discussing the exact meaning of this provision, and it is usually cited in tandem along with 31 U.S.C. § 3702(a) with no further comment. See, e.g., 58 Comp. Gen. 501, 502 (1979). However, it does not mean what a literal reading might suggest, and it is clear that GAO does not view this provision as giving it any special authority in the actual litigation of debt claims in court. The Justice Department is the government's litigator (28 U.S.C. § 516), and GAO has never construed 31 U.S.C. § 3526(a) as in any way pre-empting this. E.g., B-42663, July 26, 1944. What the statute essentially does is confirm or reinforce GAO's oversight role in the debt collection process. See B-117604-O.M., January 12, 1973.

Next is the Federal Claims Collection Act of 1966, as amended. GAO has a special role under this statute and prescribes governmentwide implementing regulations jointly with the Department of Justice. The statute and regulations are discussed in detail in various places throughout this chapter.

GAO's authority to render formal legal decisions also comes into play. On the payment side, decisions of the Comptroller General serve two functions: interpreting statutes and determining the merits of particular claims. On the debt side, there are still decisions interpreting statutes, but there are many fewer decisions adjudicating individual claims. There are several reasons for this. Uniform requirements under the Federal Claims Collection Act eliminate the need for many decisions. Also, the typical debt case tends to be fairly clear-cut at least in terms of its legal foundation, and problems are more likely to relate to collection procedures than to the existence of the debt itself. Finally, while most claimants are aggressive in pursuing payment claims at least through available administrative channels, the average debtor is much less likely to take an active role. As with the payment side, GAO will not intrude into areas committed by statute to the exclusive jurisdiction of another agency. E.g., B-164031(3).125, November 7, 1977 (reasonable cost determinations under Medicare Program).

Finally, GAO's various audit authorities are relevant. GAO, in the performance of its audit and oversight functions, has issued numerous reports on debt collection. They range from governmentwide reviews, several of which will be noted later, to reviews of particular agencies or programs[6].

3. Governmentwide Statutes and Regulations: An Overview

Prior to 1966, there were no uniform policies or procedures for debt collection throughout the federal government. While GAO made some efforts by virtue of its audit and claims settlement functions, debt collection lacked a governmentwide statutory basis and procedures varied greatly from agency to agency. As a general proposition, debt collection received little emphasis during this time period.

While some authority existed under the common law, lack of adequate statutory powers hampered debt collection. For example, as discussed in Chapter 12, the authority to "settle and adjust" claims had long been construed as not including the authority to compromise. Although a few agencies had specific compromise authority, most, GAO included, did not. To make things worse, to simply terminate collection action would have been viewed as giving away government property, which, as noted above, no government official has the right to do without statutory authority.

Thus, the administrative agency—if it did anything at all—had to attempt to collect the full amount of the debt. If the agency was unsuccessful, it had to refer the claim to GAO, which again could do nothing more than attempt to collect the full amount. If GAO's efforts were similarly fruitless, the claim went to the Justice Department, and it was only there that compromise could be considered.[7] Under this system, the Justice Department was burdened with referrals of worthless as well as collectible debts. Congress was also burdened with many requests for private relief legislation.

[6]Some examples are Farmers Home Administration: Debt Relief Actions for Business Entity Borrowers Are Questionable, GAO/RCED-92-29 (December 1991); Debt Collection: More Aggressive Action Needed to Collect Debts Owed by Health Professionals, GAO/AFMD-88-23 (February 1988); Debt Collection: Interior's Efforts to Collect Delinquent Royalties, Fines, and Assessments, GAO/AFMD-87-21BR (June 1987); Defaulted Student Loans: Guaranty Agencies' Collection Practices and Procedures, GAO/HRD-86-114BR (July 1986); Action Needed to Reduce, Account for, and Collect Overpayments to Federal Retirees, GAO/AFMD-83-19 (June 1983).

[7]This is an oversimplification. Older materials often refer to 31 U.S.C. § 194 (1976 ed.), a statute enacted in 1863, prior to the creation of the Justice Department, giving the Secretary of the Treasury a role in approving compromises. The significance of this statute during the first several decades of the 20th century is unclear. See Executive Order No. 6166, § 5 (June 10, 1933); 38 Op. Att'y Gen. 98 (1934). In any event, it was repealed in 1978.

In 1966, Congress took the first major step toward establishing a governmentwide system of debt collection, by enacting the Federal Claims Collection Act of 1966, Pub. L. No. 89-508, 80 Stat. 308. The legislation had been recommended by the Justice Department and was largely a joint GAO-Justice effort. Enactment stemmed from the congressional belief that giving agencies the authority to compromise claims would result in increased collections since agencies would be able to settle claims while they were fresh and while the debtors still had the ability to pay. Also, Congress considered it a better business practice for agencies to handle their own claims since agency staffs are more likely to be familiar with the facts and legalities of the claims. A further congressional objective was to reduce congestion in the courts. See generally S. Rep. No. 1331 (reprinted in 1966 U.S. Code Cong. & Admin. News 2532) and H.R. Rep. No. 1533, 89th Cong., 2d Sess. (1966).

The Federal Claims Collection Act of 1966, as amended, provides the basic legal framework for agency collection of debts owed to the United States, with oversight by the General Accounting Office and the Department of Justice.[8] It directs all agencies to pursue collection efforts and, subject to a monetary ceiling, authorizes compromise, suspension, or termination of collection action in limited circumstances. All of these concepts will be explored fully later in this chapter.

While the 1966 legislation was a major development in federal debt collection, it did not do the job. A 1978 GAO report, The Government Needs to Do a Better Job of Collecting Amounts Owed by the Public, FGMSD-78-61 (October 20, 1978), called attention to serious deficiencies in federal debt collection programs. Continuing its emphasis on debt collection, GAO issued several further reports of governmentwide significance.[9] The heightened awareness generated in part by this series of reports produced improvements in government debt collection through increased management focus. See GAO report entitled Significant Improvements Seen in Efforts to Collect Debts Owed the Federal Government, GAO/AFMD-83-57 (April 28, 1983).

During the same time period, Congress had also once again turned its attention to debt collection, culminating in the next major piece of debt

[8]A brief description of the 1966 legislation may be found in Sidney B. Jacoby, The 89th Congress and Government Litigation, 67 Colum. L. Rev. 1212 (1967).

[9]Federal Agencies Negligent in Collecting Debts Arising from Audits, AFMD-82-32 (January 2, 1982); Unresolved Issues Impede Federal Debt Collection Efforts—A Status Report, CD-80-1 (January 15, 1980); The Government Can Be More Productive in Collecting Its Debts by Following Commercial Practices, FGMSD-78-59 (February 23, 1979).

collection legislation, the Debt Collection Act of 1982, Pub. L. No. 97–365, 96 Stat. 1749.[10] The 1982 law provides a statutory basis for a number of specific collection tools such as interest, offset, and the use of private collection agencies.[11]

The Federal Claims Collection Act authorizes GAO and the Justice Department to jointly issue governmentwide implementing regulations. Individual agency regulations are to conform to these joint regulations. This provision, part of the 1966 legislation, is now found at 31 U.S.C. § 3711(e). The selection of GAO and the Justice Department was quite deliberate—GAO because of its expertise in administrative debt collection, the Justice Department because of its expertise in litigation.[12] The joint GAO-Justice Department regulations are known as the Federal Claims Collection Standards (FCCS). The original version of the FCCS was published on October 15, 1966 (31 Fed. Reg. 13381). The regulations have been amended several times, and were comprehensively revised and reissued in their entirety on March 9, 1984 (49 Fed. Reg. 8889). The regulations themselves are found in 4 C.F.R. Parts 101–105. Those who work regularly in the debt collection area should also have a copy of the preamble (supplementary information statement) accompanying the 1984 reissuance, since it contains much useful explanatory material. It appears at 49 Fed. Reg. 8889–8896.

In issuing the Federal Claims Collection Standards, GAO and the Justice Department have broad authority to "regulate" federal debt collection activities. Many provisions in the Standards correspond to specific provisions in the governing statutes. Others implement the general debt collection mandate found in 31 U.S.C. § 3711(a)(1). The Standards "can be [and are] used to prescribe any method or procedure which could reasonably be said to enhance debt collection efforts so long as it is not inconsistent with other law." B-117604(3)-O.M., January 16, 1979.

[10]Several sections of the Debt Collection Act were phrased in terms of amendments to the Federal Claims Collection Act. Other sections amended provisions appearing in other titles of the U.S. Code. As a result of the 1982 recodification of Title 31, the Federal Claims Collection Act, as amended by the Debt Collection Act, appears in Title 31 of the United States Code, with other debt collection provisions, at Chapter 37, Subchapters I (specifically § 3701) and II (§§ 3711–3719).

[11]An early review of selected problems in the implementation of the Debt Collection Act is Debt Collection: Billions Are Owed While Collection and Accounting Problems Are Unresolved, GAO/AFMD-86-39 (May 1986). A more recent study, centering more on the extent to which selected agencies are using available authorities, is Debt Management: More Aggressive Actions Needed to Reduce Billions in Overpayments, GAO/HRD-91-46 (July 1991).

[12]H.R. Rep. No. 1533, 89th Cong., 2d Sess. 4 (1966); S. Rep. No. 1331, 89th Cong., 2d Sess. 3 (1966), 1966 U.S. Code Cong. & Admin. News at 2534.

While the Standards can thus address both policies and procedures, GAO and the Justice Department have chosen to emphasize the former. The approach is expressed in the following passage from the preamble to the 1984 reissuance of the FCCS:

> "Many commenters felt that the Standards are not sufficiently detailed. Several commenters suggested uniform and more detailed procedures either throughout the Standards or in some particular area. . . . However, since their inception in 1966, the Standards have never been intended to prescribe detailed procedures. Rather, they are designed primarily to address policies, and to provide general guidance on sound debt collection principles. It is our belief that detailed procedures are best developed in the context of individual agency regulations, where they can be tailored to meet the needs and experiences of particular programs and activities. Each Federal agency is required to develop its own implementing regulations, based on and consistent with these Standards, and it is there that we believe the detailed procedures belong. While uniformity of policy is desirable throughout the Federal Government, we have never been convinced that uniformity of operating procedures is either necessary or beneficial." (Emphasis in original.)

49 Fed. Reg. 8889. GAO provides further procedural guidance in title 4 of the GAO Policy and Procedures Manual for Guidance of Federal Agencies. See 4 C.F.R. § 101.1.

Two additional agencies have key roles in the management and oversight of federal debt collection—the Office of Management and Budget and the Treasury Department.

The principal OMB document is Managing Federal Credit Programs, OMB Circular No. A-129 (November 25, 1988). The underlying debt collection philosophy is similar to GAO's. The circular (Part I, sec. 1) is designed to ensure "fair but aggressive collection" of amounts due the government.

In a 1986 Memorandum of Understanding, OMB designated the Treasury Department's Financial Management Service as "lead agency" for credit management and debt collection. Treasury has issued several relevant publications. Some of them are:

- Treasury Financial Manual (TFM), Volume I, Part 6, Chapter 8000 (Cash Management).
- Managing Government Credit: A Supplement to the Treasury Financial Manual (January 1989).

- The Debt Collection Process (December 1987).[13]

Next, it is important to emphasize that our focus in this chapter is on governmentwide authorities and restrictions. Many agencies are subject to additional agency-specific or program-specific statutory provisions, some existing prior to the Federal Claims Collection Act, others enacted subsequently. For example, the Small Business Administration has specific compromise authority. 15 U.S.C. § 634(b)(2). So does the Department of Veterans Affairs with respect to certain of its programs. 38 U.S.C. § 3720(a)(4). Another example is the Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651–2653.

The point to note is that the Federal Claims Collection Act was not intended to increase or diminish the existing authority of any agency to settle, compromise, close, or litigate debt claims. This was specified in section 4 of the 1966 legislation (Pub. L. No. 89–508, § 4, 80 Stat. 309).[14] One of the objectives of section 4 was to preserve existing authority to compromise claims in excess of the monetary limit applicable under the Federal Claims Collection Act. However, it does not make the existing authority exclusive so as to preclude GAO's compromise authority within the limits of the Federal Claims Collection Act. B-160819-O.M., February 10, 1967.

Another statute which should be mentioned is the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692o. This statute regulates debt collectors by prohibiting a number of harassing or abusive activities (§ 1692d), false or misleading representations (§ 1692e), and unfair practices (§ 1692f). Among the prohibited items are threats of violence, use of obscene or profane language, and threats to take actions that cannot legally be taken.

The Fair Debt Collection Practices Act does not apply to officers or employees of the United States acting in the performance of their official

[13]We have not attempted to cross-reference the OMB and Treasury publications for each point covered in this chapter, but emphasize that the reader should always consult the relevant OMB and Treasury issuances for additional guidance.

[14]Prior to the 1982 recodification of Title 31, section 4 was found at 31 U.S.C. § 953. The provision was viewed as being of "limited interest" and was not retained in the recodified Title 31. Revision of Title 31, United States Code, "Money and Finance," Report of the Committee on the Judiciary, H.R. Rep. No. 651, 97th Cong., 2d Sess. 340 (1982) (Table 3—Laws Omitted but not Repealed). Nevertheless, it is still good law.

duties. 15 U.S.C. § 1692a(6)(C).[15] While the statute may not apply as a matter of law, engaging in abusive practices of the type prohibited is certainly undesirable as a matter of policy. It is, for example, the policy of the Department of Justice for United States Attorneys to follow the limitations of the Fair Debt Collection Practices Act with respect to prohibited activities.[16] While GAO has not addressed the point formally, this strikes the editors as sound guidance for all federal debt collectors.

4. Scope of the Federal Claims Collection Act and Standards

a. What Is a Debt?

In its simplest terms, a debt, for purposes of the Federal Claims Collection Act and Standards, is something you owe the federal government. The Standards define "debt" as "an amount of money or property which has been determined by an appropriate agency official to be owed to the United States from any person, organization, or entity, except another Federal agency." 4 C.F.R. § 101.2(a).

When GAO and the Justice Department were preparing the 1984 version of the Standards, several commenters asked for clarification of the difference between a "debt" and a "claim." In one sense, there is a logical distinction. Suppose, for example, you buy a house and take out a mortgage for $100,000 with your local bank. You have a "debt" to the bank in the full amount of the note you signed. However, as long as you continue making your payments on time, the bank cannot take any collection action against you. In this sense, the bank does not have a "claim" against you unless and until you fall behind in your payments. Be that as it may, as the 1984 preamble notes, the Debt Collection Act of 1982 appears to use the terms interchangeably.[17] It was decided that creating a distinction in the Standards would not serve a useful purpose. "In the final analysis, following the substance of the regulations is more important than specific nomenclature." 49 Fed. Reg. at 8889. Thus, the Standards also use the terms interchangeably. 4 C.F.R. § 101.2(a).

[15]Occasional statutory exceptions exist. For example, a provision in recent Treasury, Postal Service and General Government Appropriations Acts requires compliance with certain provisions of the Fair Debt Collection Practices Act by Internal Revenue Service employees in the collection of tax underpayments. E.g., Pub. L. No. 103–123, Treasury Department General Provisions § 104, 107 Stat. 1226, 1233 (1993) (FY 1994).

[16]United States Attorneys' Manual, title 11, § 11-10-1.120 (April 1986).

[17]The names of the two key statutes bear this out—the Federal Claims Collection Act of 1966 and the Debt Collection Act of 1982.

It should be readily apparent that a "debt," for purposes of the Federal Claims Collection Act and Standards, requires two elements: there must be an amount of money or property which is owed to the United States, and the government must be entitled to receive it immediately. If it is not immediately payable (as, for example, in the case of loan payments which have not yet become due), then there is no "debt" upon which collection action can be taken, regardless of the terminology used. Thus, the Standards opted for substance over semantics.[18]

One very important point emerges from the definition in section 101.2(a): a debt comes into existence when the government agency determines that there is a debt, unless some statute provides otherwise. The government does not have to go to court to establish the indebtedness. The existence and amount of the debt are determined in the first instance by the agency involved. At first glance, this may seem heavy-handed, but it is not. Obviously, the debtor retains the right to contest the debt through available administrative or judicial channels. Also, the government must follow any required procedures in connection with any particular form of collection action. But it is the agency's initial determination that triggers or sets in motion the debt collection process. See Bell v. New Jersey, 461 U.S. 773, 791 (1983), in which the Supreme Court applied the same concept to government claims under the Elementary and Secondary Education Act. See also Old Republic Ins. Co. v. Federal Crop Ins. Corp., 947 F.2d 269, 276 (7th Cir. 1991) (argument that agency's overpayment determinations were not "debts" subject to offset held to be without merit); DiSilvestro v. United States, 405 F.2d 150, 155 (2d Cir. 1968) ("the right of set-off arose when . . . the V.A. found that its prior decision granting DiSilvestro service-connected disability benefits was [erroneous]").

What kinds of debts are covered? The Debt Collection Act of 1982 contained a definition of "claim," now found at 31 U.S.C. § 3701(b): "amounts owing on account of loans insured or guaranteed by the Government and other amounts due the Government." This is one instance in which the language of the recodification lost some of the flavor of the original. The original Debt Collection Act language was as follows:

"For purposes of this Act, the term 'claim' includes amounts owing on account of loans insured or guaranteed by the United States and all other amounts due the United States

[18]For an early discussion of the ambiguities in words such as "due," see United States v. State Bank of North Carolina, 31 U.S. (6 Pet.) 29, 36–37 (1832). More recently, a "form over substance" argument was rejected in United States v. Luce, 78 F. Supp. 241, 243 (D. Minn. 1948).

from fees, duties, leases, rents, royalties, services, sales of real or personal property, overpayments, fines, penalties, damages, interest, taxes, forfeitures, and other sources."[19]

While the flavor was thus diluted in the recodification, the substance is clearly the same since the specific items would all be included in the phrase "other amounts due the Government" and, more importantly, the recodification was not intended to make any substantive changes.

It becomes rather clear from this definition that Congress intended that the Act and Standards have a very broad scope. The quoted language has been incorporated by the Office of Management and Budget (OMB Circular No. A-129, Appendix 1 at 2) and by the Treasury Department (Managing Government Credit: A Supplement to the Treasury Financial Manual, at 7–9).

Note that the definition in 4 C.F.R. § 101.2(a) refers to claims for "money or property." The Standards specifically include conversion claims. Where someone is holding property belonging to the government, the creditor agency can demand either return of the specific property or the payment of its value. 4 C.F.R. § 101.5.

Thus far, the only case we have found construing the definition in 31 U.S.C. § 3701(b) is United States v. Excellair, Inc., 637 F. Supp. 1377 (D. Colo. 1986). In that case, the court held that, for purposes of enforcing the government's priority under 31 U.S.C. § 3713 against a preferential transfer by an insolvent debtor, the government had a "claim" under a guaranteed loan even though at the time of the transfer the guarantee had not yet been honored. Id. at 1394–95. While the holding is relevant for purposes of the priority statute, it would seem to have limited application to other forms of collection action.

As noted above, the debt collection process is triggered by the agency's initial determination of the existence and amount of the debt. While this is enough to start the process, several collection tools, as we will see later in the chapter, apply only to a debt which has become "delinquent." Thus, for collection purposes, there is a difference between a "debt" and a "delinquent debt." The theory is that certain collection actions should be employed only after the debtor has been given a chance to pay voluntarily. For purposes of the Federal Claims Collection Act and Standards, a debt becomes "delinquent" (1) if it has not been paid by the date specified in the agency's initial written notification (i.e., the agency's first demand

[19]Federal Claims Collection Act of 1966, § 3(g), added by Pub. L. No. 97–365, § 13(b), 96 Stat. 1758.

letter), unless other payment arrangements have been made by that date, or (2) if at any time thereafter the debtor defaults on a repayment agreement. 4 C.F.R. § 101.2(b). The following examples will illustrate:

- Example 1: Agency sends first demand letter demanding payment within 30 days. Nothing happens. Debt becomes delinquent on day 31.
- Example 2: Agency sends first demand letter demanding payment within 30 days. Within that time, agency and debtor negotiate a repayment agreement calling for monthly payments. Debtor makes first 6 payments on time but misses the 7th. Debt becomes delinquent the day after the due date for the missed payment.

b. Agencies Covered

As a general proposition, the Federal Claims Collection Act, as amended by the Debt Collection Act of 1982, and the Federal Claims Collection Standards, apply to all agencies and instrumentalities in the executive and legislative branches of the federal government. Those provisions of the Federal Claims Collection Act, as amended, deriving either from the 1966 statute (e.g., 31 U.S.C. §§ 3711(a)–(e)), or from those portions of the Debt Collection Act of 1982 which were enacted as amendments to the Federal Claims Collection Act (e.g., 31 U.S.C. §§ 3711(f), 3716, 3717, 3718), are phrased as applicable to "executive or legislative agencies," which in turn is defined in 31 U.S.C. § 3701(a)(4) as including any "department, agency, or instrumentality in the executive or legislative branch of the Government." The term "executive or legislative agency" in this context has been held to include independent agencies such as the Nuclear Regulatory Commission. Commonwealth Edison Co. v. Nuclear Regulatory Commission, 830 F.2d 610, 618–620 (7th Cir. 1987).

c. Exemptions

There are a number of situations in which the Federal Claims Collection Act and Standards do not apply, either in whole or in part. The exemptions vary in scope because they stem from different sources—the Federal Claims Collection Act of 1966, the Standards themselves, the Debt Collection Act of 1982, or some combination thereof.

(1) Antitrust claims and claims tainted with fraud

Two partial exemptions were specified in the Federal Claims Collection Act of 1966. Section 3 of that legislation expressly made the authority to compromise, and to suspend or terminate collection action, inapplicable to (1) claims involving a violation of the antitrust laws, and (2) claims in which there is an indication of fraud, misrepresentation, or the presentation of a false claim. These exemptions are now found in 31 U.S.C.

§ 3711(c)(1). Note that these exemptions do not extend to the entire Act or Standards; they apply only to the compromise, suspension, and termination authority.

The corresponding provision of the Federal Claims Collection Standards is 4 C.F.R. § 101.3(a). It clearly spells out agency responsibilities with respect to fraud and antitrust claims. Upon identifying a claim subject to one of these exemptions, the agency is to promptly refer the matter to the Justice Department. The Justice Department may retain the claim, or it may return it to the agency with instructions to proceed with administrative collection action. Thus, the scope of agency collection actions will depend on precisely what Justice tells the agency to do.

(2) Tax claims

Tax claims are excluded from the coverage of the Federal Claims Collection Standards. 4 C.F.R. § 101.3(b). This exemption has been in the Standards since their inception. Tax claims "are a special, preferred type of debt and have been from time immemorial." B-156022-O.M., October 25, 1968. Collection of taxes is governed by the Internal Revenue Code, which has its own authorities and procedures. See, for example, 26 U.S.C. §§ 6321–26 (tax liens) and 6331 (tax levy). The exemption of section 101.3(b) now has a partial statutory basis. Section 8(e) of the Debt Collection Act of 1982, codified at 31 U.S.C. § 3701(d), provides that, with certain exceptions, the Debt Collection Act does not apply to debts arising under the Internal Revenue Code. The exemption in the Standards is broader because it is not limited to authorities contained in the Debt Collection Act.[20]

In B-229068.4, August 3, 1988, GAO considered the applicability of the Federal Claims Collection Act and Standards to reclamation fees assessed against coal mining companies under the Surface Mining Control and Reclamation Act of 1977. The question arose because the court in United States v. River Coal Co., 748 F.2d 1103 (6th Cir. 1984), had held that the fees were involuntary exactions and therefore constituted a tax. GAO first noted that the Federal Claims Collection Act itself has no blanket exemption for tax claims. GAO then found it unnecessary to decide whether 4 C.F.R. § 101.3(b) applied to "tax claims" other than those arising under the

[20]The pre-recodification version of the definition of "claim" in the Debt Collection Act of 1982, quoted earlier in the text, expressly includes "taxes." Thus, although they chose not to do so, presumably GAO and the Justice Department could have included tax debts in the Federal Claims Collection Standards, at least to the extent not covered by the Internal Revenue Code and its own implementing regulations nor exempted by section 8(e). What might have been gained by this is not clear.

Internal Revenue Code because the Interior Department was free to adopt similar provisions in its own regulations, and had in fact done so. Thus, Interior could compromise a claim for reclamation fees in accordance with 31 U.S.C. § 3711. (B-156022-O.M., cited above, indicates that section 101.3(b) was viewed as addressing tax claims under the Internal Revenue Code.)

(3) Section 8(e) exemptions

Section 8(e) of the Debt Collection Act of 1982, noted above in connection with tax claims, also embraces debts arising under the Social Security Act or the tariff laws of the United States. This is not an exemption from the entire Federal Claims Collection Act and Standards, but only from those remedies and procedures prescribed by the Debt Collection Act itself. See 31 U.S.C. § 3701(d); 4 C.F.R. § 102.19(a). The Standards further point out that the exemption "should not be construed as prohibiting use of these authorities and requirements when collecting debts owed by persons employed by agencies administering the laws cited in the preceding paragraph unless the debt 'arose under' those laws." 4 C.F.R. § 102.19(b).

In order for the section 8(e) exemption to apply, two conditions must exist: the collection action in question must derive from the Debt Collection Act of 1982, and the debt must be one "arising under" the Internal Revenue Code, the Social Security Act, or the tariff laws. If either of these conditions is not met, the exemption does not apply. This gets somewhat complicated. A few examples may help:

- The Internal Revenue Service asserts a tax underpayment claim against an employee of the Social Security Administration. The claim cannot be referred to a private collection agency since the claim "arose under" the Internal Revenue Code and the authority to hire private debt collectors was prescribed by the Debt Collection Act.
- The Social Security Administration wishes to compromise a benefit overpayment claim against a private individual. Although the debt "arose under" the Social Security Act, the section 8(e) exemption does not apply because compromise authority was not one of the newly enacted provisions of the Debt Collection Act.
- SSA wants to assess a penalty against one of its employees for delinquent repayment of an unused travel advance. Although the penalty provision was one of the newly enacted Debt Collection Act provisions, SSA may assess the penalty because the debt did not "arise under" the Social Security Act, Internal Revenue Code, or tariff laws.

(4) Interagency claims

Interagency claims—claims by federal agencies against other federal agencies—are also excluded from the coverage of the Federal Claims Collection Standards. 4 C.F.R. § 101.3(c). In addition, the definition of "debt" in 4 C.F.R. § 101.2(a), discussed above, excludes amounts owed by other federal agencies. The only statutory reference to interagency claims is 31 U.S.C. § 3701(c), under which interagency claims are not subject to 31 U.S.C. §§ 3716 (administrative offset) or 3717 (interest and penalties). These provisions were added by the Debt Collection Act of 1982. As with tax claims, the exemption in the Standards is broader.

The exemption of section 101.3(c) is a blanket exemption, newly added in the 1984 version of the Standards. However, as the preamble noted (49 Fed. Reg. at 8890), this was merely the codification of existing practice. E.g., B-182398-O.M., September 3, 1976. This is not merely an example of the government being good to itself. Rather, it is a recognition that the collection tools set forth in the Standards simply are not available when asserting a claim against another federal agency. The situation was summed up in the following passage from B-217990.25-O.M., October 30, 1987:

"A claim against another federal agency is different from a claim against a private party. The tools available to collect a debt from the private party are not available when the debtor is another federal agency, either as a matter of law or as a practical matter. We cannot sue the other agency; we cannot hire a private debt collector; we cannot charge interest; we cannot offset the claim against the agency's present or future appropriations."

The range of options in collecting a claim from another federal agency is extremely limited. The Standards instruct agencies to attempt to resolve interagency claims by negotiation. If this fails, the claim should be referred to GAO. 4 C.F.R. § 101.3(c). The agency should not simply "write off" the claim. B-214972-O.M., April 26, 1985. GAO will review the claim and render its objective opinion as to the claim's validity, for whatever persuasive influence that may have. GAO cannot, however, enforce collection any more than the creditor agency itself could.

(5) State and local governments

Another limited exemption deriving from the Debt Collection Act is 31 U.S.C. § 3701(c), which provides that sections 3716 (administrative offset) and 3717 (interest and penalties) do not apply to debts owed by state or

local governments. The state and local government exemption will be discussed more fully later in this chapter.

(6) Civil vs. criminal claims

Nothing in either the Federal Claims Collection Act of 1966 or the Debt Collection Act of 1982 expressly limits the coverage of those statutes to civil claims. However, since their inception, the Federal Claims Collection Standards have included such a limitation. See 4 C.F.R. § 101.1.

The collection of criminal fines and penalties is the responsibility of the Department of Justice. Authorities and procedures are found in various provisions of Title 18 of the United States Code. Many of the current provisions, including those cited below, stem from the Criminal Fine Improvements Act of 1987, Pub. L. No. 100–185, 101 Stat. 1279.

A criminal fine is imposed by the court as part or all of the sentence. It is payable immediately unless the court provides for installment payments for a period not to exceed five years, excluding any time the defendant is in jail. 18 U.S.C. § 3572(d). The fine is "delinquent" if payment is more than 30 days late, and is "in default" if delinquent for more than 90 days. A fine in default becomes due within 30 days after notification by the Attorney General, notwithstanding any installment schedule. Id. §§ 3572(h) and (i), 3612(e).

Fines in excess of $2,500 bear interest unless waived or limited by the court. In addition, penalties are added to fines which become delinquent or in default. Id. §§ 3612(f), (g). If the government petitions the court upon a showing that reasonable collection efforts are not likely to succeed, the court may remit or defer payment of the fine or may extend an installment schedule. Id. § 3573. The Attorney General may waive interest or penalties on the same grounds. Id. § 3612(h).

In sum, criminal fines have their own detailed collection authorities and procedures prescribed by statute. Because of this, and because of the integral role of the sentencing court in criminal matters, criminal fines are excluded from the coverage of the Federal Claims Collection Standards.

Where a criminal action and civil liability arise out of the same facts, the disposition of the criminal action does not affect the debtor's civil liability for any outstanding balance. B-136570, August 4, 1958; B-133647, October 30, 1957.

(7) More specific agency authority

Program legislation or agency organic authority may include provisions dealing with various aspects of debt collection. Where such provisions exist, they, and their implementing regulations, take precedence over the Federal Claims Collection Act and Standards. An example is 19 U.S.C. § 1505(c), specifying the due date, delinquency date, and interest accrual date for customs duties found to be due upon liquidation or reliquidation. Of course, an agency may incorporate part or all of the Standards in its own regulations to the extent consistent with the governing statute. To the extent the agency has not issued its own implementing regulations, the Federal Claims Collection Standards should be followed. 4 C.F.R. § 101.4; 62 Comp. Gen. 489 (1983); B-170686-O.M., April 4, 1972. The same concept applies with respect to the section 8(e) exemption where the authority subject to the exemption can be found elsewhere. A decision discussing all of this in the context of debts arising under the Social Security Act is 62 Comp. Gen. 599 (1983).

5. Agency Regulations

A frequently asked question is whether each federal agency is required to issue its own debt collection regulations. The answer is yes. The basic requirement for individual agency regulations, which must conform to the Federal Claims Collection Standards, stems from section 3(a) of the Federal Claims Collection Act of 1966, now codified at 31 U.S.C. § 3711(e).

In addition, several provisions of the Debt Collection Act of 1982, and of the Standards, require regulations in specific contexts. For example:

- The statute authorizing salary offsets against federal employees requires implementing regulations. 5 U.S.C. § 5514(b). The regulations must be approved by the President, who has delegated approval authority to the Office of Personnel Management.
- Agencies are required to issue regulations for administrative offset under section 10 of the Debt Collection Act of 1982. The regulations should take into consideration the best interests of the government, the likelihood of collecting by offset, and, with respect to offsets beyond the 6-year statute of limitations prescribed by 28 U.S.C. § 2415, the cost effectiveness of leaving the claim unresolved for that period of time.[21] 31 U.S.C. § 3716(b). See 4 C.F.R. § 102.3(b) for additional requirements.

[21]The intent of this latter provision has never been entirely clear inasmuch as, apart from the erosion in the value of money, it presumably costs nothing to do nothing.

- Waiver of interest and related charges beyond the mandatory 30-day grace period provided under 31 U.S.C. § 3717 may be exercised only in accordance with regulations. 4 C.F.R. § 102.13(g).
- Agencies obtaining mailing addresses from the Internal Revenue Service must, by regulation, ensure appropriate safeguarding of the information. 4 C.F.R. § 102.18(c).

The agency's debt collection regulations, apart from the fact that they are required by law, serve many functions. For example, they

- establish agency-specific procedures, such as identifying who within the agency will have responsibility for various functions;
- tailor the policies in the Standards to the needs and requirements of individual programs; and
- reflect the agency's policy choices in areas where discretionary options exist.

GAO will review agency debt collection regulations as part of its audit function. 4 C.F.R. § 101.1.

Preparing and issuing a comprehensive set of regulations takes time, and the law recognizes this. The general principle that an agency has a reasonable time to issue its regulations is discussed in 64 Comp. Gen. 816 (1985). What is "reasonable" in a particular context depends on several variables, such as the complexity of the subject matter. In the cited decision, GAO advised the Department of Education that it could take administrative offset under 31 U.S.C. § 3716 although it had not yet issued the required regulations, but it must of course comply with all requirements of the statute.

There is also authority for the proposition that the failure to publish regulations will not invalidate agency action with respect to a party with actual knowledge. 5 U.S.C. § 552(a)(1); Rogers v. United States, 14 Cl. Ct. 39, 48 (1987); B-217215, March 20, 1986 (citing several additional court cases).

C. Elements of a Debt Collection Program: Agency Collection Action

1. Affirmative Duty to Collect

The Federal Claims Collection and Debt Collection Acts "express a Congressional mandate that agencies play a more active role in the collection of delinquent claims than merely referring them to the Department of Justice." Lawrence v. Commodity Futures Trading Commission, 759 F.2d 767, 772 (9th Cir. 1985). See also Collins v. Donovan, 661 F.2d 705, 708 (8th Cir. 1981).

To this end, the Federal Claims Collection Act of 1966 included a provision, now found at 31 U.S.C. § 3711(a)(1), which requires each agency to attempt collection of all claims of the United States for money or property arising out of the activities of, or referred to, that agency. As the Comptroller General noted in commenting on the 1966 legislation, this was the first general statutory requirement for government agencies to collect their debts. B-117604, June 3, 1966. The requirement applies without regard to the amount of the debt. Thus, regardless of one's view of the scope of the common-law duty, agencies now have a statutory duty which clearly embraces administrative collection actions.

The corresponding provision of the Federal Claims Collection Standards is 4 C.F.R. § 102.1(a). Agency collection action should be aggressive and timely with effective follow-up. Id. Agencies should use all reasonable means of collection consistent with good business practice and the debtor's ability to pay. Section 102.1(b) states the common-sense proposition that agencies are expected to cooperate with one another in their debt collection activities.

An agency may provide administrative debt collection services to another agency under an Economy Act agreement (31 U.S.C. § 1535), but, since agencies may not use the Economy Act to transfer statutory responsibilities to other agencies, those services cannot include the taking of final compromise or termination action. B-117604(7)-O.M., June 30, 1970.

The various collection tools noted in the Federal Claims Collection Standards serve as a checklist for the agency in developing its own debt collection program. However, every tool does not have to be used in every case. The actions to be taken depend on the facts and circumstances of the particular claim. Also, the agency can use any administrative collection remedy not specified in the Standards and not otherwise prohibited. 4 C.F.R. § 102.20.

Agencies are not required to duplicate administrative procedures. 4 C.F.R. § 101.7. The point is repeated in the Standards in the specific context of administrative offset. Id. § 102.3(b)(2)(ii). The 1984 preamble gives an example. If an agency has already provided a within-agency review prior to reporting the debt to a consumer reporting agency, it need not repeat the review for purposes of administrative offset. 49 Fed. Reg. at 8892.

Several of the authorities provided in the Federal Claims Collection Act and Standards require a somewhat detailed discussion and will be covered in subsequent portions of this chapter. The remainder of this section summarizes a number of points not noted elsewhere in the chapter.

Once an agency has determined that a debt exists, the first step in the collection process is to locate the debtor. In doing so, the agency should not overlook the obvious. A number of potential sources, several of which are relatively simple and inexpensive, are listed in 4 C.F.R. § 104.2(a). Examples are motor vehicle license, title, and registration records, and the telephone directory.

If the simpler methods fail, the agency can request the debtor's mailing address from the Internal Revenue Service and may disclose the address to certain third parties. The request must be in writing. This was authorized by section 8 of the Debt Collection Act of 1982, amending 26 U.S.C. § 6103(m). The agency must safeguard the information as provided in 26 U.S.C. § 6103(p). The corresponding provision in the Standards is 4 C.F.R. § 102.18, which does little more than repeat the statute.

Where a debtor corporation has dissolved and, under state law, the corporation's assets become the property of the shareholders, subject to any claims not paid at the time of dissolution, the agency may try to obtain from the appropriate state agency a list of shareholders or an accounting of the distribution of assets, or it may seek payment from a statutory agent. See B-184396-O.M., August 8, 1975.

Agencies should collect claims against a partnership from partnership assets, if any. Otherwise, the government should look to individual assets of any general partners not adjudged bankrupt. See, e.g., B-161821-O.M., August 3, 1967; B-161821, November 28, 1967 (non-decision letter). The government need not forbear collecting from a surety even though there is a possibility of recovery from the principal. See B-160740, February 13, 1969 (non-decision letter).

Where debtors are jointly and severally liable to the United States, the government is not required to collect a proportionate share from each. The government may collect the entire amount from one debtor, leaving it to that debtor to seek contribution from the others, if that is determined to be the best way to liquidate the indebtedness as quickly as possible. 58 Comp. Gen. 778 (1979); 4 C.F.R. § 103.6.

The agency should conduct a personal interview with the debtor whenever feasible. 4 C.F.R. § 102.7. This is subject to common-sense cost effectiveness considerations. You don't, at least without some special reason, send an interviewer across the country on a $50 debt. As the 1984 preamble emphasizes, an interview will almost always be "feasible" where the debtor is a federal employee. 49 Fed. Reg. at 8892.

Executive Order 12674 (Principles of Ethical Conduct for Government Officers and Employees), § 101(l) (1989), directs federal employees to satisfy all just financial obligations, especially those imposed by law such as taxes. While the employing agency is generally not authorized to assist a private creditor collect a debt from an agency employee (see Taggart v. United States, 17 Ct. Cl. 322 (1881); B-171593, March 9, 1971), it is expected to cooperate with another federal agency. 4 C.F.R. § 102.1(b). Thus, in cases where the creditor agency and the employing agency are different and the creditor agency is unable to collect by offset, it should contact the employing agency for assistance in making suitable payment arrangements. 4 C.F.R. § 102.8.

Agencies seeking to collect statutory penalties, forfeitures, or other debts provided for as an enforcement aid or for compelling compliance should consider suspending or revoking licenses or other privileges in cases of inexcusable, prolonged, or repeated failure to repay indebtedness. 4 C.F.R. § 102.9. See also Lawrence v. Commodity Futures Trading Commission, 759 F.2d 767, 772 n.12 (9th Cir. 1985). Section 102.9 also directs agencies which make, guarantee, or insure loans to give serious consideration to disqualifying a debtor (lender, borrower, or otherwise) from doing further

business with the agency if the debtor fails to pay a debt within a reasonable time. Section 102.9 is an expression of policy, not a mandatory requirement. Before invoking this authority, the agency should review relevant program legislation for possible restrictions. 1984 preamble, 49 Fed. Reg. at 8893.

An agency holding security or collateral should liquidate it if the debtor does not pay within a reasonable time, if the liquidation can be accomplished through the exercise of a power of sale in the security instrument or nonjudicial foreclosure, unless the cost of disposing of the collateral will be disproportionate to its value. The agency should give the debtor reasonable notice of the sale and an accounting of any surplus proceeds. 4 C.F.R. § 102.10.

The agency should document all collection actions taken and should retain the documentation in the appropriate claim file. 4 C.F.R. § 102.15. The Treasury Department has prepared a detailed sample checklist for this purpose, included as Appendix 4 to Managing Government Credit: A Supplement to the Treasury Financial Manual. Apart from its value during the administrative collection process, keeping a running record will greatly facilitate referring the debt to the Justice Department for litigation if that should become necessary. Also, to the extent feasible and cost effective, agencies should automate their debt collection operations. Id. § 102.16.

Agencies should perform periodic cost analyses of their collection operations. Cost data is useful for many purposes, not the least of which is justifying adequate resources for an effective collection program. See 4 C.F.R. § 102.14.

2. Demand Letters

Once the debtor is located, the next step is to inform him, her, or it of the government's claim and to solicit voluntary payment. This begins the "demand cycle." The demand cycle consists of a series of demand letters ("dunning letters") which inform the debtor of the consequences of failure to cooperate. The requirements for demand letters are found in 4 C.F.R. § 102.2.

Normally, the demand cycle will consist of three letters, in progressively stronger language, sent out at not more than 30-day intervals. Id. § 102.2(a). The first letter is particularly important. It should (1) explain the basis of the government's claim; (2) state the amount of the

indebtedness; (3) specify the payment due date, which normally should be not more than 30 days after the initial demand; and (4) set forth the applicable requirements for assessing interest. Id. § 102.2(b). Other items, several of which are specified in section 102.2(c), may also be included as appropriate to the circumstances.

The tone of the letter is also important. The objective is to encourage voluntary payment. While the letter should be firm, an overly harsh or threatening tone gains little. The letter should also be written in "plain English." A letter which requires a team of lawyers to decipher is not likely to serve its intended purpose.

It is important to emphasize that the use of three demand letters is not an absolute requirement. The first letter is always necessary, although the Standards recognize that even it may be preceded by other actions when necessary to protect the government's interests, for example, referring the debt to the Justice Department in cases where collection action has not begun until the statute of limitations is about to expire. Id. § 102.2(a). As the 1984 preamble noted, "the agency should not be required to follow the demand cycle if doing so would result in loss of the Government's ability to sue on the debt." 49 Fed. Reg. at 8890.

In addition, the agency may send fewer than three demand letters where the debtor's response to the first or second letter indicates that further letters would be futile. 4 C.F.R. § 102.2(a). Conversely, nothing prohibits the agency from sending more than three letters, although it would be the rare case in which this would be a productive effort.

Demand letters should be mailed or hand-delivered on the same day that they are dated. Id. § 102.2(b). "If a demand letter is going to impose a deadline on a debtor, the time allowed should not be eroded by the agency's delay in processing the letter." 1984 preamble, 49 Fed. Reg. at 8890. Naturally, the agency should respond promptly to any communications from the debtor. 4 C.F.R. § 102.2(d).

The availability of funds for offset is another reason for deviating from the normal demand cycle. If the agency has a source of funds available for offset and intends to use it, it need not pursue any other collection actions. However, the agency still must send the debtor a letter notifying the debtor of the agency's intention to collect by offset. The agency must also comply with the requirements of the applicable offset statute. 4 C.F.R. § 102.2(e). Exactly what else this letter must contain depends on precisely

where the agency is in the demand cycle. If the agency has not yet sent any demand letters, the notification of intent to collect by offset must give the debtor the opportunity to avoid the offset by making voluntary payment. Id. In this situation, the notification letter, which is required for offset anyway, "doubles" as the first (and maybe only) demand letter. The situation is explained further in the 1984 preamble, 49 Fed. Reg. at 8890.

Agencies may find it productive to make telephone contact with debtors early in the demand cycle. Finding that private debt collectors and many states use early telephone contact to advantage, GAO has recommended that the Internal Revenue Service try it as a means of increasing tax delinquency collections. GAO report, Tax Administration: New Delinquent Tax Collection Methods for IRS, GAO/GGD-93-67 (May 1993).

3. Collection in Installments

It is the policy of the Federal Claims Collection Standards that debts should be collected in full in one lump-sum payment whenever feasible. 4 C.F.R. § 102.11(a). However, this will not always be possible. Respect for the federal government is not enhanced by attempting to enforce collection in full against someone who simply cannot afford it. Accordingly, the Standards authorize agencies to accept payment in regular installments if the debtor is financially unable to pay the debt all at once. See B-182423, November 25, 1974; B-160158, October 18, 1966.

Requirements for installment payments are contained in 4 C.F.R. § 102.11. The general standard is that the size and frequency of installment payments should be reasonably related to the size of the debt and the debtor's ability to pay. Id. § 102.11(a). For example, in a case in which collection efforts would have been futile because the debtor's assets were heavily mortgaged, GAO did not object to the debtor's proposal to pay ten percent of the debt at once and three percent of the balance monthly thereafter until the debt was liquidated. B-134871, October 20, 1966 (non-decision letter).

Other important points from 4 C.F.R. § 102.11 are as follows:

- Before agreeing to an installment plan, the agency should obtain a financial statement from the debtor. There is no prescribed format for the financial statement.
- If possible, the installment payments should be designed to liquidate the debt in not more than 3 years. This is a target, not a legal requirement. B-256184, May 3, 1994.

- Installment payments should be at least $50 per month, although the agency may accept less if justified by the circumstances.
- An installment plan should be in the form of a legally enforceable written agreement.
- The agreement should contain an acceleration clause.
- If the deferred balance exceeds $750 and the claim is unsecured, the agency may wish to obtain a confess-judgment note from the debtor. If the agency does so, it must give the debtor a written explanation of the consequences. If the debtor refuses to execute the confess-judgment note or to provide other adequate security, the agency may or may not accept an installment plan, at its option.

The requirement for an acceleration clause was added to the Standards in the 1984 revision. This refers to a "default" acceleration, under which, if the debtor fails to make an installment payment when it becomes due, or within any grace period provided in the agreement, all of the remaining installments become immediately due and payable, either automatically or at the creditor's option.[22] The Standards do not authorize the "at will" or "insecurity" type of acceleration under which payment may be accelerated in non-default situations if the creditor deems its position insecure. A case discussing the different types of acceleration is Brown v. Avemco Investment Corp., 603 F.2d 1367 (9th Cir. 1979).

The need for an acceleration clause is summarized in the following passage from Johnson v. McCrackin-Sturman Ford, Inc., 527 F.2d 257, 264 (3d Cir. 1975):

"[T]here is probably not an installment contract in force today that does not contain a clause granting the creditor the right to require immediate payment of all installments upon the happening of a specified event, usually a default in repayment of the loan. Exercise of that right by the creditor shortens, sometimes dramatically, the time period during which the borrower would normally be able to repay the loan. The purpose of such a provision is obvious. Without the right to accelerate payment, the creditor would be forced to sue each month as each installment payment became due and as the borrower defaulted on the installment, a course of action that is both commercially unreasonable and, in all probability, quite expensive to the borrower since he might be liable for 24 or 30 different sets of court costs."

[22]The choice between an automatic or a creditor's option clause has statute of limitations implications. See United States v. Dos Cabezas Corp., 995 F.2d 1486, 1490 (9th Cir. 1993).

See also Quick v. American Steel and Pump Corp., 397 F.2d 561, 564 (2d Cir. 1968) ("contracts to pay money in instalments are breached one instalment at a time").

It is important to include an acceleration clause in an installment agreement because, in simple debt repayment situations, acceleration is permissible only if provided for in the relevant contract. E.g., New York Life Ins. Co. v. Viglas, 297 U.S. 672, 679–81 (1936); City of Hampton, Va. v. United States, 218 F.2d 401, 405 (4th Cir. 1955); Local 1574, International Association of Machinists and Aerospace Workers v. Gulf and Western Manufacturing Co., 417 F. Supp. 191, 201 (D. Me. 1976); Llewellyn Iron Works v. Littlefield, 74 Wash. 86, 132 P. 867, 868 (1913); Holcomb v. Webley, 185 Va. 150, 37 S.E.2d 762, 765 (1946); B-226918.2-O.M., April 8, 1988. There may be situations in which the agency chooses not to invoke its right of acceleration, but it should always make sure it has that right and the only way to do that is by including a clause in the agreement.

If an installment agreement does not contain an acceleration clause, all may not necessarily be lost, depending on the type of debt. An early Supreme Court decision stated the following principle:

> "By the general commercial law, as well of England as of the United States, a promissory note does not discharge the debt for which it is given unless such be the express agreement of the parties; it only operates to extend until its maturity the period for the payment of the debt. The creditor may return the note when dishonored, and proceed upon the original debt."

The Kimball, 70 U.S. (3 Wall.) 37, 45 (1865). The principle has found its most frequent application in the context of new notes given for previously held notes, with the courts holding that the renewal note does not extinguish the original liability unless the parties have clearly expressed that intention. E.g., Mid-Eastern Electronics, Inc. v. First National Bank of S. Md., 455 F.2d 141, 144–45 (4th Cir. 1970); In re Mid-Atlantic Piping Products of Charlotte, Inc., 24 B.R. 314, 324 (Bankr. W.D.N.C. 1982). Of course, the concept is most useful in cases in which the debt, prior to execution of the renewal note or agreement, was such that the creditor had the right to demand immediate payment in full (as opposed, for example, to the case of a simple loan agreement in which the original liability is defined in terms of installment payments). Also, it presupposes that action may still be taken on the original debt (e.g., applicable statutes of limitations have not expired). See B-226918.2-O.M., April 8, 1988.

GAO applied the rule of The Kimball in a 1985 decision, 64 Comp. Gen. 493. The debt in that case arose from nonpayment of contractual obligations to the Soil and Conservation Service, Department of Agriculture, under the Great Plains Conservation Program. After several time extensions under the original contract, the agency, at the debtor's urging, accepted an installment workout agreement. Payments still were not made. GAO agreed with the agency that it could treat the workout agreement as void, and proceed to collect the full amount of the pre-existing debt, including offset against payments due the debtor under another program.

Related concepts are rescheduling and refinancing. Rescheduling is not specifically mentioned in the Federal Claims Collection Standards, but is addressed in OMB Circular No. A-129 and the Treasury Department's Managing Government Credit: A Supplement to the Treasury Financial Manual. Rescheduling is a change in the existing terms of a debt, usually a loan. As both OMB and Treasury point out, the creditor agency should determine that recovery of all or a portion of the debt is reasonably assured before agreeing to a rescheduling. Also, a rescheduling agreement should be in legally enforceable form and should contain an acceleration clause. Managing Government Credit at 4–9.

Refinancing usually involves executing a new note which then replaces the original obligation. Refinancing also is not addressed in the Federal Claims Collection Standards. Program legislation may contain applicable authorities or restrictions. An illustrative case is 43 Comp. Gen. 98 (1963), in which GAO advised that a rescheduling of payments under a vessel mortgage to provide for reduced payments over a longer period of time did not contravene a prohibition on refinancing in the Merchant Marine Act.

4. Interest and Related Charges

a. Interest

As discussed in Chapters 12 and 14, interest is payable on claims against the United States only where expressly provided by statute or contract. With respect to claims by the United States, however, the rules are not the same, nor is there any legal requirement that they be the same. See Boston Sand and Gravel Co. v. United States, 278 U.S. 41, 49 (1928); 63 Comp. Gen. 391 (1984). While the difference in the rules is sometimes assailed as unfair, it necessarily follows from the concept of sovereign immunity.

(1) Common law

Prior to the 1980s, there was no governmentwide statute authorizing the United States to charge interest on debt claims, and the government was forced to rely on the common law. The United States had long asserted the common-law right to charge interest on amounts owed to it, and this right was recognized by the courts. For example, in Billings v. United States, 232 U.S. 261, 286 (1914), the Supreme Court stated:

> "[A]s to the necessity for a statute it was long ago here decided in view of the true conception of interest, that a statute was not necessary to compel its payment where in accordance with the principles of equity and justice in the enforcement of an obligation, interest should be allowed."

See also Royal Indemnity Co. v. United States, 313 U.S. 289, 295–97 (1941); Boston Sand and Gravel, 278 U.S. at 49; Swartzbaugh Manufacturing Co. v. United States, 289 F.2d 81, 84 (6th Cir. 1961); United States v. Abrams, 197 F.2d 803, 805–06 (6th Cir. 1952); United States v. Philmac Manufacturing Co., 192 F.2d 517 (3d Cir. 1951). More recent cases are West Virginia v. United States, 479 U.S. 305 (1987) and Riles v. Bennett, 831 F.2d 875 (9th Cir. 1987).

During this time period, the Comptroller General also consistently recognized the government's common-law right to charge interest. E.g., 59 Comp. Gen. 359 (1980); B-192479, September 27, 1978; B-137762.21-O.M., January 3, 1977. The principle applied to contract debts as well as non-contract debts. E.g., 41 Comp. Gen. 222 (1961); B-131925, July 13, 1964.

The government's common-law right to charge interest applied equally to claims against its own employees and retirees. B-192479, September 27, 1978. For example, in a letter report to the Chairman of the Civil Service Commission (now Office of Personnel Management), GAO reviewed the status of government claims against employee retirement accounts and recommended that the Commission start charging interest on these claims. FGMSD-77-41, September 15, 1977.

Since their inception, the Federal Claims Collection Standards included an interest provision based on the common law. See 31 Fed. Reg. 13382 (October 15, 1966). The pre-1982 version of the Treasury Financial Manual also included provisions for interest.

However, the common-law authority proved to be inadequate. GAO reviews in the 1970s revealed that many agencies were not charging interest on debt claims, and there was no consistency among those that did. See, e.g., The Government Needs to Do a Better Job of Collecting Amounts Owed by the Public, FGMSD-78-61 (October 20, 1978), Chapter 4; FGMSD-77-41, cited above.

(2) Debt Collection Act of 1982

In section 306 of the Supplemental Appropriations and Rescission Act, 1980, Pub. L. No. 96–304, 94 Stat. 857, 928, Congress directed all agencies receiving funds under the act (essentially the entire government) to charge interest in accordance with the Federal Claims Collection Standards. This appears to be the first governmentwide legislative attempt to mandate interest assessments. Whether section 306 could be construed as permanent legislation does not appear to have been addressed, although the issue would soon become moot.

Reporting on what would become the Debt Collection Act of 1982, the Senate Committee on Governmental Affairs discussed the interest problem as follows:

"Generally, there is either no assessment for interest and penalties on debts owed the government or, if there is, the assessment is at rates that are considerably below market rates. This is in spite of the joint GAO/Justice Department regulations issued in the Federal Claims Collection Standards in April 1979 and subsequent Treasury regulations which require agencies to charge debtors interest on overdue payments. . . .

"In the absence of interest charges for delinquent payments, debtors have little or no incentive to make timely payments. Also, debtors are likely to pay their private sector debts first and their government debts last. The Committee has concluded that this factor is a major contributor to the growing amount of delinquent debt owed the government."

S. Rep. No. 378, 97th Cong., 2d Sess. 17 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 3377, 3393.

The resulting legislation was section 11 of the Debt Collection Act of 1982, codified at 31 U.S.C. § 3717. The pertinent provision of the Federal Claims Collection Standards is 4 C.F.R. § 102.13. The preamble to the 1984 Standards noted, somewhat apologetically, that "[t]his portion of the regulation is complex because the corresponding provisions of the Debt Collection Act are complex." 49 Fed. Reg. at 8893.

Prior to the Debt Collection Act, there was some confusion as to whether charging interest was required or whether it was merely authorized. The Debt Collection Act removed all doubt. It is now a mandatory requirement. 31 U.S.C. § 3717(a)(1); 4 C.F.R. § 102.13(a); Commonwealth Edison Co. v. United States Nuclear Regulatory Commission, 830 F.2d 610, 620–21 (7th Cir. 1987).

Interest begins to accrue from the date on which notice of the interest requirements is mailed or hand-delivered. 31 U.S.C. § 3717(b); 4 C.F.R. § 102.13(b). As pointed out earlier, interest requirements should be included in the agency's first demand letter. Under the common law, there was no requirement for a specific interest notification; notice of the underlying debt was sufficient. See B-217215, March 20, 1986. While 31 U.S.C. § 3717(b)(2) refers merely to "notice of the amount due," the Standards are much more explicit in this regard and require notice of the interest assessment. 4 C.F.R. §§ 102.2(b), 102.13(a). The notice should not be dated prior to the date of actual mailing or hand-delivery. Id. § 102.13(b).

If an agency uses an "advance billing" system—that is, if it mails a bill before payment is actually due—it can include the interest notification in its advance billing, although interest cannot start to accrue until the payment due date. Id.

The rate of interest to be charged is the "Treasury tax and loan account rate," also known as the "current value of funds rate," in effect as of the date on which interest begins to accrue. 31 U.S.C. §§ 3717(a)(1), (c)(1); 4 C.F.R. § 102.13(c). Since 31 U.S.C. § 3717(a)(1) uses the language "minimum annual rate of interest," the Standards recognize that authority exists to charge a higher rate. 4 C.F.R. § 102.13(c). However, noting that the unequal treatment of similarly situated debtors is undesirable, the preamble to the 1984 Standards advises that agencies should charge a higher rate of interest "only under the most compelling circumstances." 49 Fed. Reg. at 8893. Agencies wishing to avail themselves of this possibility might be well-advised to identify any such "compelling circumstances" in their regulations.

Once the applicable rate of interest is determined with respect to a particular debt, it remains fixed for the duration of the indebtedness. 31 U.S.C. § 3717(c)(2); 4 C.F.R. § 102.13(c).[23]

[23]This had been the case even prior to the Debt Collection Act. See B-107871, July 31, 1981 (non-decision letter).

Interest is generally computed on a "daily rate" basis, although if this is not cost effective, GAO considers the requirement satisfied by any commercially acceptable method which provides approximately the same result. B-222845, December 9, 1987 (non-decision letter). The "daily rate" method is computed as follows:

- Multiply the principal amount of the debt by the interest rate. This gives you the annual interest amount.
- Divide the annual interest amount by 365 (or 366 for a leap year). This gives you the daily interest amount.
- Compute the actual number of days for the period involved.
- Multiply the number of days by the daily interest amount.

This is the same method that has traditionally been used for computing interest on payments by the United States unless otherwise provided by statute.

A simple illustration may help. Suppose you have a principal of $1 million with interest due for a 60-day period at an annual rate of 9 percent:

- Step 1: 1,000,000 x .09 = $90,000, the amount of interest for a full year.
- Step 2: 90,000 divided by 365 = $246.58, the amount of interest accruing each day.
- Step 3: 246.58 x 60 = $14,794.80.

Thus, interest on $1 million at 9 percent for 60 days is $14,794.80. Should the accrual period extend beyond 60 days, interest would continue to accrue at the rate of $246.58 per day.

Although 31 U.S.C. § 3717 does not prohibit charging interest on interest, the Standards permit it in only one situation. If the debtor defaults on a repayment agreement and the agency agrees to a new repayment agreement, the principal amount of the new agreement should consist of the unpaid principal under the old agreement plus any accrued but unpaid interest. The agency may then apply the interest rate in effect at the time of the new agreement to this new principal. 4 C.F.R. § 102.13(c). This is also the only exception to the rule noted above that the initial rate of interest remains fixed for the life of the indebtedness. Interest may not, however, be assessed on penalties or administrative costs, discussed later in this section. 31 U.S.C. § 3717(f); 4 C.F.R. § 102.13(c).

If a payment is made in less than the full amount due, the Standards apply the so-called "American Rule." The payment is applied first to outstanding penalty and administrative cost charges, second to accrued interest, and third to outstanding principal. 4 C.F.R. § 102.13(f). This is the same approach the government had traditionally followed under the common law. See, e.g., Woodward v. Jewell, 140 U.S. 247, 248 (1891); B-47882, January 11, 1946.

The statute provides a mandatory 30-day grace period. Although interest accrues from the date of the initial interest notification, no interest will be charged if the debt is repaid within 30 days after the accrual date. 31 U.S.C. § 3717(d); 4 C.F.R. § 102.13(g).

In addition, agencies have discretionary authority to waive interest, in whole or in part, (1) beyond the 30-day grace period on a case-by-case basis; (2) under the criteria specified in 4 C.F.R. Part 103 relating to compromise; or (3) if the agency determines that collection of interest would be "against equity and good conscience or not in the best interests of the United States." 31 U.S.C. §§ 3717(d), (h); 4 C.F.R. § 102.13(g). These discretionary waivers may be exercised only in accordance with agency regulations. 4 C.F.R. § 102.13(g). One situation the Standards identify as a good candidate for waiver of interest is where, under an installment plan, the interest rate is sufficiently high in relation to the size of the installment payments that the debt will never be repaid—the so-called "perpetual debtor." Id.

In applying the "equity and good conscience" standard, agencies may look to GAO's waiver regulations under 5 U.S.C. § 5584 for guidance. The preamble to the 1984 Standards contains the following explanation:

> "A commenter asked whether the phrase 'equity and good conscience' as used in § 102.13(g) has the same meaning as in 4 CFR 91.5(c), GAO's waiver regulations under 5 U.S.C. 5584. Although the concepts are not identical, the approach used in 4 CFR 91.5(c) may be useful by analogy in suggesting other situations agencies may wish to consider in their regulations. Under 4 CFR 91.5(c), 'equity and good conscience' is generally satisfied where the indebtedness resulted from the agency's administrative error and there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the debtor. However, waiver should be denied where the agency's actions giving rise to the indebtedness were such as to put a reasonable person on notice that something was wrong and to have reasonably suggested further inquiry by the debtor." 49 Fed. Reg. at 8893.

Another potential candidate for waiver of interest under 4 C.F.R. § 102.13(g) is during agency consideration of a request for reconsideration or waiver of the underlying debt under a permissive statute. The collection of many debts may be waived under various waiver statutes. If the waiver statute is mandatory—that is, if it prohibits collection action until the waiver process has run its course—interest may not be charged while the underlying debt is under mandatory suspension. 4 C.F.R. § 102.13(h). If the waiver statute is permissive, the agency has several options. It may continue collecting interest, or it may suspend collection of interest under the suspension standards. If waiver of the underlying debt is denied, the agency may still consider waiving interest during the pendency of the waiver request if it has so provided in its regulations. The topic of assessing interest pending waiver determinations is discussed generally in 63 Comp. Gen. 10 (1983).

The Contract Disputes Act of 1978 is a permissive statute for purposes of 4 C.F.R. § 102.13(g). Accordingly, an agency is not required to discontinue the assessment of—and generally should continue assessing—interest and related charges during the pendency of appeals under the Contract Disputes Act. 70 Comp. Gen. 517 (1991).

The government is authorized to charge interest until it actually receives payment. Treasury Financial Manual, I TFM § 6-8025.40; 63 Comp. Gen. 391 (1984) (quoting an earlier version of the TFM); 17 Comp. Dec. 3 (1910). This can produce a practical problem. Even the most conscientious debtor paying by mail will not know exactly when payment is received. Also, many debtors may tend to compute interest up to the date of their check, not including any allowance for mailing time. In these situations, the agency has the right to assert a claim for additional interest up to the date of actual receipt. However, there may be a number of reasons for not doing so, not the least of which is cost effectiveness. E.g., B-134617, January 30, 1958. Thus, although not identified as such in the Standards, this is another situation agencies may consider including in their interest waiver regulations, although they should probably reserve the option of asserting the additional claim where justified by the amounts involved.

The requirements of 31 U.S.C. § 3717 do not apply "if a statute, regulation required by statute, loan agreement, or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges." Id. § 3717(g)(1). Thus, 31 U.S.C. § 3717 defers to any agency-specific or program-specific legislation which addresses late payment charges. For example, interest and related charges assessed by the Department of

Veterans Affairs are governed by 38 U.S.C. § 5315 (Supp. IV 1992) rather than 31 U.S.C. § 3717. 66 Comp. Gen. 512 (1987).

There are also situations in which more specific agency legislation will not wholly supplant 31 U.S.C. § 3717 but will exist side-by-side with it. For example, the Farmers Home Administration is generally subject to 31 U.S.C. § 3717, although its own legislation prohibits charging interest on the interest portion of loan payments which are less than 90 days overdue. B-199395-O.M., September 13, 1983. Also, the FmHA has its own statutory authority to terminate the accrual of interest on the guaranteed portion of defaulted loans, subject to definition in FmHA regulations. 67 Comp. Gen. 471 (1988).

As noted, 31 U.S.C. § 3717 will also defer to explicit terms in a contract or loan agreement. An illustration is 65 Comp. Gen. 245 (1986), dealing with contract provisions under the Department of Agriculture's Feed Grain, Rice, Upland Cotton and Wheat program. Another is B-235577, August 8, 1989 (internal memorandum) (promissory notes used by FmHA).[24] See also United States v. American Ins. Co., 18 F.3d 1104 (3d Cir. 1994) (court found Internal Revenue Code rate rather than Debt Collection Act rate applicable to surety on a tax obligation).

The Federal Labor Relations Authority has held that the term "contract" in 31 U.S.C. § 3717(g)(1) does not include a collective bargaining agreement. Thus, interest under 31 U.S.C. § 3717 is not a negotiable issue. National Federation of Federal Employees, Local 29, 21 F.L.R.A. 101 (1986).

The exemptions summarized above, together with others previously noted, are listed in 4 C.F.R. § 102.13(i)(1). However, where 31 U.S.C. § 3717 does not apply, agencies may still be authorized to assess interest to the extent authorized under the common law or other applicable statutory authority. 4 C.F.R. § 102.13(i)(2).

The government's right to charge interest applies to debts owed to it by the District of Columbia government. 60 Comp. Gen. 710 (1981) (amounts owed to Government Printing Office for printing and binding services performed under 31 U.S.C. § 1537). Essentially, this is because the District is

[24]The Debt Collection Act also "grandfathered" contracts which had been executed prior to October 25, 1982 (date of enactment of the Debt Collection Act) and which were still in effect as of that date. 31 U.S.C. § 3717(g)(2). E.g., B-203787-O.M., March 22, 1983 (section 3717 not applicable to Department of Energy uranium enrichment contracts executed prior to, and still in effect on, October 25, 1982). In Florida Department of Labor and Employment Security v. U.S. Department of Labor, 893 F.2d 1319 (11th Cir. 1990), the court applied subsection (g)(2) to find section 3717 inapplicable to certain grants under the former Comprehensive Employment and Training Act.

not a federal agency. Normally, absent statutory authority to the contrary, one federal agency may not assess interest against another federal agency. E.g., B-161457, May 9, 1978 (no authority for Internal Revenue Service to assess interest against another federal agency for late filing or underpayment of income or social security withholding taxes).

Interest recovered on a debt claim must be deposited in the Treasury as miscellaneous receipts unless the creditor agency has statutory authority for some other disposition. I TFM § 6-8025.70. See, e.g., B-217595, April 2, 1986 (interest on late payments under timber sale contracts properly deposited as miscellaneous receipts).

Finally, the subject of interest on penalties merits brief mention. Penalties are of two types, criminal and civil. Absent specific statutory authority, the government may not charge interest on a criminal fine or penalty. Pierce v. United States, 255 U.S. 398, 405–406 (1921). As we have already noted, the Federal Claims Collection Standards do not apply to criminal fines or penalties, although separate statutory authority to charge interest now exists by virtue of the Criminal Fine Improvements Act of 1987. The pre-1984 version of the Standards, based on Rodgers v. United States, 332 U.S. 371 (1947), had also excluded from its interest provision civil penalties and forfeitures designed as punishment or deterrent and not as a revenue-raising device. The 1984 Standards deleted the exclusion for civil penalties and forfeitures because the definition of "claim" in the Debt Collection Act now provides the requisite statutory authority.

b. Late Payment Penalties

Penalties often resemble interest, especially when they are expressed in terms of a percentage rate. The concepts are different, however. Interest is designed to compensate for the loss of use of money. Ideally, it should bear a reasonable relationship to the loss actually incurred. A penalty, on the other hand, is precisely what the term implies. Unlike interest, the government has no common-law right to impose a penalty. Penalties require statutory authority. E.g., Pender Peanut Corp. v. United States, 20 Cl. Ct. 447, 453 (1990). Thus, prior to the establishment of a statutory interest rate in the Debt Collection Act of 1982, GAO had cautioned that an interest rate assessed under common-law authority should not be so high as to constitute a penalty. E.g., 59 Comp. Gen. 359, 360 (1980); B-192479, September 27, 1978.

Statutory authority for penalties now exists. Section 11 of the Debt Collection Act of 1982 mandates a penalty of "not more than 6 percent a

year for failure to pay a part of a debt more than 90 days past due." 31 U.S.C. § 3717(e)(2).

As we have seen, a debt is "due" on the date specified by the creditor agency in its first demand letter. Therefore, the debt is "past due" when it becomes "delinquent" as defined in 4 C.F.R. § 101.2(b). The penalty attaches when the debt is delinquent for more than 90 days, although it accrues from the date the debt became delinquent. Id. § 102.13(e). Thus, if payment is due within 30 days, it becomes delinquent or "past due" on day 31. The penalty attaches on day 121, computed from day 31.

The rate is expressed as a maximum, "not more than 6 percent a year," and the Standards retain this flexibility. Id. However, setting the penalty rate is not wholly discretionary. The 1984 preamble explains the intent of section 102.13(e) as follows:

> "As with interest, the penalty rate should be consistent throughout the Government, and agencies should use a rate of less than 6 percent only with compelling justification." 49 Fed. Reg. at 8893.

While 31 U.S.C. § 3717 prohibits assessing interest on the penalty required by subsection 3717(e)(2), it does not prohibit assessing the penalty on interest. Thus, the penalty should be assessed on all portions of the debt that are delinquent for more than 90 days, including interest and administrative costs. B-222845, December 9, 1987 (non-decision letter).

The portions of the preceding discussion on interest relating to discretionary waiver, non-assessment under a mandatory waiver statute, and the various exemptions apply equally to penalties.

c. Administrative Costs

In addition to interest and penalties, section 11 of the Debt Collection Act mandates a third type of charge: "a charge to cover the cost of processing and handling a delinquent claim." 31 U.S.C. § 3717(e)(1). Administrative costs do not come into play unless and until the debt becomes delinquent.

The corresponding provision of the Federal Claims Collection Standards is 4 C.F.R. § 102.13(d). It gives as examples costs incurred in obtaining a credit report or in using a private debt collector, to the extent attributable to delinquency. Administrative costs should be calculated on the basis of either actual costs incurred or cost analyses establishing an average for debts in similar stages of delinquency. Id.

The preamble to the 1984 Standards offered the following additional commentary:

"Beyond [the examples cited in § 102.13(d)], further detail is not feasible. For example, if the volume of delinquencies were such that an agency had to hire additional personnel solely to process the delinquencies, then the salaries of these additional personnel might be included. The test agencies must use is whether the particular cost was incurred by virtue of the delinquency or whether it would have been incurred in any event." 49 Fed. Reg. at 8893.

Administrative costs for purposes of 31 U.S.C. § 3717 do not include the costs of appeals brought under the Contract Disputes Act. 70 Comp. Gen. 517 (1991).

The portions of the preceding discussion on interest relating to discretionary waiver, non-assessment under a mandatory waiver statute, and the various exemptions apply equally to administrative costs.

Unless an agency has statutory authority for some other disposition, administrative costs collected under 31 U.S.C. § 3717(e)(1) may not be retained by the agency for credit to its own appropriations but must, as with interest and penalties, be deposited in the Treasury as miscellaneous receipts. Treasury Financial Manual, I TFM § 6-8025.70; B-199395.3-O.M., December 18, 1984.

d. State and Local Governments

As we have seen, section 11 of the Debt Collection Act did not create a new right with respect to the assessment of interest. It merely gave a statutory basis to a right which existed under the common law. Subject to equitable considerations, the common-law right to charge interest applies to debts of state and local governments just as it applies to other debtors. West Virginia v. United States, 479 U.S. 305 (1987); Board of County Commissioners of the County of Jackson, Kan. v. United States, 308 U.S. 343 (1939). However, section 11 defined the term "person" for purposes of the interest, penalty, and administrative cost provisions of that section as not including federal agencies or state or local governments. That exclusion is now codified at 31 U.S.C. § 3701(c).[25]

The exemption for federal agencies added little since interest and offset were not available against other federal agencies to begin with. The "state or local government" language, however, was soon to become a hotly

[25]Section 10 of the Debt Collection Act included an identical provision with respect to administrative offset. It is also included in section 3701(c). Thus, while we are phrasing our discussion here in terms of interest, it applies equally to administrative offset.

contested issue. The issue, in a nutshell, is whether 31 U.S.C. § 3701(c) is an exemption or a prohibition. If it is an exemption, then 31 U.S.C. § 3717 does not apply to state or local governments, but whatever authority existed under the common law remains. If it is a prohibition, then it totally displaces the common law, and the authority to charge interest on debts owed by state and local governments has been eliminated.

Comments received in connection with the revision of the Federal Claims Collection Standards fell along predictable lines. Federal agencies supported the exemption approach; nonfederal commenters urged the prohibition view. In the final regulations, the Attorney General and the Comptroller General adopted the exemption position. 4 C.F.R. §§ 102.3(b)(4) (administrative offset) and 102.13(i) (interest). Their decision was explained in the 1984 preamble. See 49 Fed. Reg. at 8891 (offset) and 8894 (interest).

GAO had expressed this position—that sections 10 and 11 do not abrogate pre-existing common-law rights beyond the extent required by their terms[26]—in a number of decisions and opinions. E.g., B-212222, January 5, 1984; B-212222, August 23, 1983; B-209669, December 17, 1982. See also 62 Comp. Gen. 599, 601–02 (1983), expressing the same position with respect to the "section 8(e) exemptions."

The courts of appeals split. The majority of circuits which considered the issue held that section 3701(c) was a prohibition and that the United States no longer had a common-law right to assess interest (or use administrative offset[27]) against state or local governments. United States v. Benton, 975 F.2d 511 (8th Cir. 1992); Texas v. United States, 951 F.2d 645 (5th Cir. 1992); Arkansas v. Block, 825 F.2d 1254 (8th Cir. 1987); Pennsylvania Department of Public Welfare v. United States, 781 F.2d 334 (3d Cir. 1986); Perales v. United States, 751 F.2d 95 (2d Cir. 1984), aff'g per curiam 598 F. Supp. 19 (S.D.N.Y. 1984). The Texas, Arkansas and Pennsylvania courts relied explicitly on what they viewed as the "plain meaning" of the statute. Two courts of appeals agreed with the government's position. Gallegos v. Lyng, 891 F.2d 788 (10th Cir. 1989); County of St. Clair, Mich. v. United States Department of Labor, No. 83–3546, slip op. (6th Cir. December 7, 1984).

[26]There would seem to be no real dispute that 31 U.S.C. § 3717 displaces the common law to the extent of its coverage. For example, an agency to which section 3717 applies may no longer rely on the common law to assess interest against an individual debtor. The controversy concerns the continued vitality of the common law in situations in which the statute does not apply.

[27]The cases all deal with interest but, as noted above, application of the same result to administrative offset is inescapable.

A few lower court cases on administrative offset also supported the government's position. In Housing Authority of the County of King v. Pierce, 701 F. Supp. 844 (D.D.C. 1988), vacated in part on other grounds, 711 F. Supp. 19 (D.D.C. 1989), the Department of Housing and Urban Development claimed to have overpaid a local governmental housing authority, and proposed recovering the overpayments by offsetting them against future payments. The court held that (1) by virtue of 31 U.S.C. § 3701(c), section 10 of the Debt Collection Act, 31 U.S.C. § 3716, and its implementing regulations did not apply; but that (2) HUD retained the authority to use administrative offset under the common law. In Sentry Insurance A Mutual Co. v. United States, 12 Cl. Ct. 320 (1987), the Claims Court upheld the use of administrative offset by the Small Business Administration under both the common law and section 3716.

The Supreme Court first took note of the issue in West Virginia v. United States, 479 U.S. 305 (1987), a case involving the liability of a state for prejudgment interest on a contractual obligation to the Army Corps of Engineers. The Court upheld the government's common-law right to assess interest and found the state liable. However, because the contract in question had been entered into prior to October 25, 1982, 31 U.S.C. § 3717 did not apply. 31 U.S.C. § 3717(g)(2). In view of this, the Court expressly declined to address the effect of the Debt Collection Act on the government's common-law rights. 479 U.S. at 312–13 n.6.

A few years later, the Court squarely addressed the issue, and resolved it in the government's favor, in United States v. Texas, 113 S. Ct. 1631 (1993), reversing Texas v. United States cited above. The Court upheld the government's common-law right to assess prejudgment interest against a state for losses under the food stamp program in excess of the applicable tolerance level. The Court noted three primary grounds for its decision:

- There is an established principle of law that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952). 113 S. Ct. at 1634.
- The Court rejected the lower court's use of the "plain meaning" rule. If anything, the plain meaning of section 3701(c) supports the government's position. "The only obligation from which § 3701 exempts the States is the obligation to pay prejudgment interest in accordance with the mandatory provisions of the [Debt Collection] Act." 113 S. Ct. at 1635.

- It is appropriate to construe section 3701(c) in a manner consistent with the overall purpose of the act, which was to enhance the government's debt collection efforts, not to seriously erode existing authority. 113 S. Ct. at 1636.

Thus, the federal government may rely on the common law to assess interest and to use administrative offset when collecting debts owed by state or local governments. However, penalties and administrative costs, authorized by 31 U.S.C. § 3717 against other debtors, cannot be assessed against state or local governments since these were not authorized under the common law.

5. Offset

Offset is one of the most important weapons in the government's debt collection arsenal. The creditor agency should always explore the possibility of collecting a debt by offset. Offset is discussed fully in Section E of this chapter.

6. Consumer Reporting Agencies

One of the reasons you pay your private debts is to avoid a bad credit rating and consequent possible denial of credit in the future. Prior to the Debt Collection Act, this motivation was largely absent in the case of debts owed to the United States. Change came about in stages.

Prior to 1979, agencies generally did not report delinquent debts to credit bureaus. Although there was no prohibition against it, neither was there any statute or regulation authorizing it. A 1979 change to the Federal Claims Collection Standards directed agencies to develop and implement procedures for reporting delinquent debts to commercial credit bureaus. 44 Fed. Reg. 22702, April 17, 1979. However, the regulation received very limited use. Problems arose over the application of the Privacy Act, and the credit bureau industry would not participate if the bureaus would be subject to the Privacy Act.

In 1980, Congress experimented with exempting credit bureaus from the Privacy Act, but only in limited situations—the (then) Veterans

Administration[28] and the Department of Education.[29] GAO supported extending legislation of this type to all government agencies.[30]

Governmentwide legislation was to come in 1982. The Senate Committee on Governmental Affairs explained the need and objective as follows:

"The use of credit bureaus is an essential, integral part of private sector credit management and debt collection. Probably the single most powerful motivation for individuals to pay their private sector debts is the threat of having their credit rating reflect a poor payment record. A poor credit rating often results in the loss of the ability to obtain additional credit. To date, federal agencies have not been able to use credit bureaus for credit management and debt collection purposes. As a result, there is no penalty from a 'credit worthiness standpoint' for debtors who are delinquent or in default on their debts to the government. There is neither an impact on their credit rating for good payment performance nor any public record of their poor payment performance. The theory behind debt reporting by the federal government is that the availability of delinquency information to private sector credit grantors will induce debtors to pay their obligations to the federal government. Those who do not pay may find that other credit is unavailable.

. . . .

"[I]n the private sector, credit reporting is used extensively. In view of the fact that the federal government operates the largest credit institution in the world, the Committee feels that it should have the same collection tools available to private lenders—this is especially true because the federal government is assuming a higher risk than the private sector in lending in most of its programs."

S. Rep. No. 378, 97th Cong., 2d Sess. 8 (1982), 1982 U.S. Code Cong. & Admin. News 3377, 3384. The House Committee on Government Operations cautioned that:

"[I]f the government is not aggressive in collection efforts, other credit grantors may simply ignore government debts when making credit decisions. Debts that are not likely to be collected are clearly of lesser relevance when evaluating the financial capabilities of an individual. Credit reporting will only be effective if the rest of the government's collection efforts are also effective."

[28]Pub. L. No. 96–466, § 606(e), 94 Stat. 2171, 2212. The authority has been retained for the Department of Veterans Affairs and is found at 38 U.S.C. § 5701(g)(2) (Supp. IV 1992).

[29]Pub. L. No. 96–374, § 445(c), 94 Stat. 1367, 1442. The Higher Education Amendments of 1986 included comparable authority, found at 20 U.S.C. § 1080a.

[30]Improving the Collection of Debts Owed the Government, Statement of Milton J. Socolar, Acting Comptroller General of the United States, before the Senate Committee on Governmental Affairs, April 23, 1981, page 4.

H.R. Rep. No. 42, 97th Cong., 1st Sess. 3 (1981).

The resulting legislation was section 3 of the Debt Collection Act of 1982, codified at 31 U.S.C. §§ 3701(a)(3) and 3711(f). The corresponding provision of the Federal Claims Collection Standards is 4 C.F.R. § 102.5. The legislation exempts credit bureaus from the Privacy Act, although the creditor agencies remain subject to it.

Under 31 U.S.C. § 3711(f), agencies may report debts to consumer reporting agencies, as defined in 31 U.S.C. § 3701(a)(3), under the following conditions:

- The agency must first publish a Privacy Act notice.
- The debt must be delinquent. The statute uses the term "overdue," which the Standards define as delinquent. 4 C.F.R. § 102.5(a).
- The agency must provide the debtor with at least 60 days' written notice of its intent to report the debt, and must provide the debtor an opportunity to seek administrative review or reconsideration of the government's claim. The procedural standards for this review are the same as for administrative offset (4 C.F.R. § 102.3) discussed later in this chapter.
- The agency must establish procedures for promptly notifying the consumer reporting agency of any changes in the status of the claim; for promptly responding to verification requests from the consumer reporting agency; and for obtaining assurances that the consumer reporting agency will comply with applicable federal laws such as the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 et seq. (An important provision, for example, is 15 U.S.C. § 1681c, which lists a number of items that may not be included in credit reports.)

The following information may be disclosed to a consumer reporting agency: information necessary to establish the individual's identity (such as name, address, and taxpayer identification number); amount, status, and history of the claim; and the agency or program under which the debt arose. 31 U.S.C. § 3711(f)(1)(F). If the creditor agency has obtained a mailing address from the Internal Revenue Service, it may disclose that information to a consumer reporting agency, but only for the purpose of preparing a commercial credit report on the taxpayer for use by the government agency in collecting the debt. 26 U.S.C. § 6103(m)(2).

The Federal Claims Collection Standards declined to set a dollar threshold for reporting debts to consumer reporting agencies, but do not inhibit others from doing so. See 1984 preamble, 49 Fed. Reg. at 8892. The

Treasury Department has set a $100 threshold, but permits reporting of smaller debts at the creditor agency's discretion. Managing Government Credit: A Supplement to the Treasury Financial Manual at 4–13.[31]

OMB and the Treasury Department offer guidance on the use of consumer reporting agencies in a number of documents. Federal debt collection offices should be aware of and consult the following:

- Agency Reporting to Credit Reporting Bureaus, OMB-Treasury Credit Policy Guidelines, Issuance No. G-1-86, February 25, 1986.
- Guidelines and Formats for the Automated Reporting of Commercial Debts to Credit Reporting Bureaus, May 30, 1986 (issued jointly by Treasury and OMB).
- OMB, Guidelines on the Relationship Between the Privacy Act of 1974 and the Debt Collection Act of 1982, March 30, 1983.

7. Commercial Collection Agencies

Another collection tool long used by the private sector but not available to federal agencies until the 1980s is the referral of debts to private debt collectors.

Prior to 1981, GAO had taken the position that the Federal Claims Collection Act did not authorize federal agencies to use private collection agencies. The legal basis for this position was that the Act authorized agencies to refer uncollected debts only to other federal agencies with claims collection responsibilities (GAO and the Justice Department) and not to private parties. From a policy perspective, GAO felt that claims collection should be handled by government agencies themselves. B-117604(11), October 4, 1972; B-171524, January 4, 1971; B-117604.7-O.M., June 30, 1970.

During this time period, GAO also opposed legislation to authorize the use of commercial collection agencies, for two reasons. First, some private collection agencies had acquired unsavory reputations resulting from the use of questionable practices which might be imputed to the United States. Second, commercial services might not have the technical knowledge or resources to provide a debtor with a proper explanation of federal laws and regulations giving rise to the debt. B-117604, October 18, 1973.

[31]Legislation enacted in 1986 directs the Secretary of Defense to invoke 31 U.S.C. § 3711(f) with respect to debts of more than $100 arising out of Defense Department activities and which are delinquent by more than 31 days. 10 U.S.C. § 2780(b).

In 1981, prompted in part by the 1977 enactment of the Fair Debt Collection Practices Act, GAO reexamined—and changed—its position. GAO's change of heart was reflected in an amendment to the Federal Claims Collection Standards authorizing the use of debt collection contractors. 46 Fed. Reg. 22353, April 17, 1981. However, as with credit bureaus, the Standards extended an invitation to the party, and nobody came. Against this background, Congress decided that statutory authority was warranted. The result was section 13 of the Debt Collection Act of 1982, 31 U.S.C. § 3718(a). The corresponding provision of the Standards is 4 C.F.R. § 102.6.

Under 31 U.S.C. § 3718(a), a debt collection contract must provide for the creditor agency to retain the authority to resolve disputes, compromise claims, suspend or terminate collection action, and refer the matter to the Justice Department for litigation. Id. § 3718(a)(1); 4 C.F.R. § 102.6(a)(1). This does not necessarily require the agency to make all of these decisions on a case-by-case basis. For example, an agency might refer a group of similar claims within its compromise authority to a collection contractor and authorize the contractor to accept compromise offers in excess of a specified percentage.

The contractor is subject to the Privacy Act and to other federal and state laws relating to debt collection practices, such as the Fair Debt Collection Practices Act. 31 U.S.C. § 3718(a)(2); 4 C.F.R. § 102.6(a)(2).

A collection services contract may be funded by payment of a fixed fee, payable from agency operating appropriations. It may also be funded on a contingent-fee basis, by including a contract provision permitting the contractor to deduct its fee from amounts collected. 31 U.S.C. § 3718(d). The Standards state that a contingent fee "should be based on a percentage of the amount collected consistent with prevailing commercial practice." 4 C.F.R. § 102.6(b)(2). Prevailing practice should be determined by geographical area.

The original 31 U.S.C. § 3718 included language making collection service contracts effective only to the extent and in the amount provided in advance in appropriation acts. This is the language required by the Congressional Budget Act of 1974 for new spending authority, including contract authority. It was misplaced in this context, however, as the authority to enter into contracts conferred by 31 U.S.C. § 3718(a) is not "contract authority" as that term is used in the Congressional Budget Act. Congress amended the law the following year to make the appropriation

act limitation inapplicable to contingent-fee contracts but leaving it intact for fixed-fee contracts. 31 U.S.C. § 3718(e). The appropriation act limitation is also inapplicable to fixed-fee contracts to the extent the agency is using a statutorily authorized revolving fund. 4 C.F.R. § 102.6(b)(3). The reason is that a revolving fund amounts to a continuing appropriation of receipts for authorized expenditures. 1984 preamble, 49 Fed. Reg. at 8892.

The authority to contract for collection services provided by 31 U.S.C. § 3718(a) applies only with respect to delinquent debts. 4 C.F.R. § 102.6(a). It does not apply to routine account servicing of non-delinquent accounts. 64 Comp. Gen. 366 (1985). See also 1984 preamble, 49 Fed. Reg. at 8892. Nor does it apply to the purchase of information identifying abandoned or unclaimed money or other property allegedly belonging to the United States. 72 Comp. Gen. 85 (1993). Such an expenditure, essentially a finder's fee, would have to be charged to some operating appropriation. Id.

Neither the Debt Collection Act nor the Standards address when an agency should refer a debt to a collection services contractor. However, OMB Circular No. A-129, § IV.4.e, directs referral if the account is delinquent by six months or more unless it has been referred to an internal agency workout group[32] or to the Justice Department for litigation, or unless there is an available source of funds for offset. The Department of Defense is directed by statute to use debt collection contractors for debts arising from Defense Department activities that are delinquent by more than three months. 10 U.S.C. § 2780(a)(1).[33]

The General Services Administration has added collection services to the Federal Supply Schedule, and has contracted with a number of private collection firms. Treasury's Financial Management Service has issued guidelines for use of the Federal Supply Schedule contracts. The Federal Supply Schedule permits "secondary referral" (referral to a second debt collection contractor) if the first contractor is unsuccessful and the agency still regards the debt as potentially collectible, or if the first contractor fails to meet the terms of a work order.

In a 1984 decision involving a pre-Federal Supply Schedule contract, a disappointed bidder protested the award of a collection services contract

[32]See Managing Government Credit: A Supplement to the Treasury Financial Manual at 4–15.

[33]A separate piece of legislation, made permanent by section 9019 of the Defense Department's 1990 appropriation act, Pub. L. No. 101–165, 103 Stat. 1112, 1133, authorizes Defense to enter into contracts "pursuant to" 31 U.S.C. § 3718, apparently giving it the option of proceeding under either 31 U.S.C. § 3718 or 10 U.S.C. § 2780.

to a firm which proposed retaining local attorneys to perform various non-litigative functions, alleging that this approach constituted the unauthorized practice of law. (States generally regulate the practice of law.) GAO denied the protest because the basic responsibility for defining and regulating the practice of law rests with the courts of the particular state, and the solicitation required that the contractor agree to comply with applicable state law. Any question regarding the unauthorized practice of law would be a matter between the contractor and state authorities. While this might give rise to legitimate concern on the part of the contracting agency, it would be a matter either of bidder responsibility or contract administration. B-213790, June 13, 1984.

The authority of 31 U.S.C. § 3718(a) to employ private debt collection contractors applies only with respect to collection services. It does not embrace legal services, although section 3718(a) would not prohibit contracting with a law firm to provide collection services. See B-221099, February 18, 1986. Contracting for legal services in the debt collection area is the subject of another statute, discussed later in the context of referrals to the Department of Justice.

8. Compromise

a. In General

We are all familiar with the concept of compromise. We employ it in many contexts in our day-to-day existence. In essence, it means giving something up in order to get something else. In the claims context, it means accepting less than the full amount owed in full satisfaction of the claim.

We have already noted the long-standing principle that compromise requires specific statutory authority. It may not be inferred, even from the authority to "settle and adjust" claims. In fact, one of the major objectives of the Federal Claims Collection Act of 1966 was to give federal agencies limited compromise authority.

Under 31 U.S.C. § 3711(a)(2) and 4 C.F.R. § 103.1, agencies have authority to compromise debt claims where the principal amount (i.e., exclusive of interest, penalties, and administrative costs) does not exceed $100,000.[34] The statute says merely "excluding interest." The Standards added penalties and administrative costs to reflect the new authorities of the

[34]The original ceiling in the 1966 legislation was $20,000. It was raised to $100,000 in 1990. 31 U.S.C. § 3711(a)(2), as amended by Pub. L. No. 101–552, § 8(b), 104 Stat. 2736, 2746–47 (1990).

Debt Collection Act of 1982. GAO has the same authority with respect to claims referred to it. The Attorney General is authorized to raise the ceiling from time to time. 31 U.S.C. § 3711(a)(2).

A compromise under the Federal Claims Collection Act and Standards is final and conclusive unless procured by fraud, misrepresentation, or mutual mistake of fact. 31 U.S.C. § 3711(d). Thus, in B-185295, January 21, 1977, a debtor who had made a compromise offer which was accepted, and then paid the compromise amount, could not later claim a refund arguing that he had paid only to avoid involuntary offset and had not intended to make a binding compromise agreement.

If the principal amount of the debt exceeds $100,000, only the Attorney General has the authority to compromise. See B-165667, December 11, 1968; B-165641, December 2, 1968 (non-decision letter). Under 4 C.F.R. § 103.1(b), Justice Department approval is required only where the agency wishes to accept a compromise offer; it is not required in order to reject an offer. Referrals to the Justice Department under section 103.1(b) must use the Claims Collection Litigation Report discussed later. Id.

A debtor's liability arising from a particular transaction or contract is considered a single claim for purposes of the $100,000 limit. An agency may not subdivide a claim to avoid the monetary limit. 4 C.F.R. § 101.6. Bills of lading are viewed as separate contracts and may be considered individually for purposes of the ceiling, however closely related they may be. B-182799-O.M., January 24, 1975; B-170829-O.M., May 13, 1974; B-159553-O.M., February 7, 1973.

At one time, some had questioned the appropriateness of compromising statutory penalties or forfeitures established to aid enforcement and to compel compliance. The Standards include a provision expressly authorizing compromise of claims of this type if the agency determines that compromise will adequately serve its enforcement policy, both present and future. 4 C.F.R. § 103.5. A factor for the agency to consider is whether the violation was willful or merely "accidental or technical." Id.

If two or more debtors are jointly and severally liable on a debt owed to the United States, the government may compromise the indebtedness of one debtor or of all of them. The agency should be careful that a compromise with one joint debtor does not release the other(s) unless this is intended. The amount of a compromise with one joint debtor does not

bind the government to the same amount with respect to the other joint debtor(s). 4 C.F.R. § 103.6.

An agency's compromise authority ceases once it refers the claim to GAO or the Justice Department. 31 U.S.C. § 3711(a)(2); 4 C.F.R. § 103.1(a).

If an agency has a firm written offer of compromise from a debtor and is uncertain whether to accept the offer, it may refer the matter to GAO or the Justice Department. GAO or Justice will, at their option and within their respective authorities, either act on the offer or return it to the agency with a recommendation. 4 C.F.R. § 103.8.

An agency may not accept a percentage of a debtor's profits or stock in a debtor corporation in compromise of a claim. 4 C.F.R. § 103.9. With this exception, there is no prohibition on accepting property instead of, or in conjunction with, money in compromise of a claim. E.g., 37 Op. Att'y Gen. 298 (1933). Obviously, the agency should use sound judgment.

b. Standards for Compromise

The term compromise "imports the making of mutual concessions by the parties to a dispute in order to arrive at an amicable settlement without recourse to adversary proceedings." B-122319, August 21, 1956. See also 38 Op. Att'y Gen. 94, 95–96 (1933). The Federal Claims Collection Act does not authorize accepting a lesser amount merely for the sake of closing out the claim. To avoid arbitrary decisions, evaluation and acceptance must be governed by enunciated criteria, and these are found in the Federal Claims Collection Standards, specifically 4 C.F.R. Part 103.[35]

As noted earlier in this chapter, several agencies have their own agency-specific or program-specific compromise authority. See, for example, 62 Comp. Gen. 489 (1983) (Economic Development Administration); 28 Comp. Gen. 638 (1949) (insured mortgage claims by predecessor of Department of Housing and Urban Development). Part 103 applies in these situations as well, to the extent the agency has not published its own implementing regulations. 4 C.F.R. § 101.4; 62 Comp. Gen. at 494.

Generally, the regulations permit compromise in three situations, discussed separately below. Compromise may be based on one or any combination of the factors set out in Part 103. 4 C.F.R. § 103.7. While final authority on claims over $100,000 rests with the Justice Department,

[35]Although the relationship between the statute and the Standards has been somewhat obfuscated by the 1982 recodification of Title 31, the original 1966 statutory language clearly expresses the intent. Pub. L. No. 89–508, § 3(b), 80 Stat. 308, 309 (1966).

agencies should nevertheless use the same factors in deciding whether to recommend acceptance. Id. § 103.1(b).

(1) Inability to pay

An agency may compromise a debt claim if the debtor is unable to pay the full amount within a reasonable time, or if the debtor has refused to pay the debt in full and the government will not be able to collect the full amount by enforced collection proceedings within a reasonable time. 4 C.F.R. § 103.2(a). The regulation lists a number of factors for the agency to consider in evaluating the situation, such as the debtor's age and health, present and potential income, and inheritance prospects. Id. § 103.2(b).

If the agency's files do not contain reasonably up-to-date credit information, the agency may obtain a statement from the debtor, executed under penalty of perjury, showing the debtor's assets, liabilities, income, and expenses. The Department of Justice has several forms available for this purpose, identified in 4 C.F.R. § 103.2(e). Where information available to the government on the debtor's financial status is not sufficient to reach a conclusion as to the debtor's ability to pay, GAO's policy is to recommend against acceptance of a compromise offer. See, e.g., B-186843-O.M., November 24, 1976. (A debtor who is sincere in making a compromise offer is likely to cooperate in providing the information.)

Where a debtor is receiving recurring payments of any substance from the government, it will be correspondingly more difficult to establish inability to pay. E.g., B-217114, August 12, 1988. However, receipt of government benefits is only one factor to be considered and does not automatically preclude compromise under the "inability to pay" standard. 62 Comp. Gen. 599, 604 (1983). Use of the "inability to pay" standard is particularly inappropriate where the debtor is on the federal payroll. 59 Comp. Gen. 28 (1979); B-253640, November 4, 1993.

It is the policy of the Standards to discourage compromises payable in installments. 4 C.F.R. § 103.2(d).[36] However, as stressed in the 1984 preamble, this is policy and not a legal requirement. 49 Fed. Reg. at 8894. An installment plan to implement a compromise should include the same safeguards as any other installment plan—legally enforceable written agreement with a default acceleration clause—plus a provision for the

[36]Although section 103.2(d) is part of the "inability to pay" standard, the point should apply equally to compromise under any of the standards.

reinstatement of the prior indebtedness less sums already paid in case of default. 4 C.F.R. § 103.2(d).

(2) Doubtful litigation probabilities

An agency may compromise a claim if it has legitimate doubt concerning the government's ability to prove its case in court for the full amount either because of the legal issues involved or because of a bona fide dispute as to the facts. The amount accepted in compromise should reflect the probabilities of the government's prevailing on the legal issue and its actually collecting a full or partial judgment, taking into consideration such factors as the availability of witnesses and other evidentiary support for the government's claim. 4 C.F.R. § 103.3. The cost of litigation is also a legitimate factor to include in the equation. See B-196058-O.M., October 29, 1979.

For example, GAO recommended acceptance of a corporation's offer to compromise for $19,300 an Atomic Energy Commission claim for $49,133.74 for loss of a rocket because of the factual uncertainties and legal principles involved in litigating the case. B-160890, May 14, 1970 (non-decision letter). In another case, GAO recommended acceptance of a debtor's offer of $125,000 to compromise a government claim for $301,833.51, in part because the debtor had some basis to question the forum in which the matter would be litigated, which could result in transfer of the case to a United States district court where the debtor could request a jury trial with its attendant uncertainties. B-170070, December 29, 1971 (non-decision letter).

In B-165667, December 11, 1968, GAO recommended to the Justice Department that it accept a $15,000 compromise offer in satisfaction of a $26,105 government claim for damage to an aircraft under a cost reimbursement Army contract with the builder. Proof of actual damage was considered extremely difficult in the case because the aircraft was never repaired due to a reduction in scope of the contract. In a case where there was serious question as to the admissibility of important documents as evidence and where it appeared that the agency could not furnish better evidence to support its claim, GAO did not object to the acceptance of a $5,000 compromise offer in settlement of a $54,655.70 claim. B-156283, July 20, 1970 (non-decision letter).

In a more recent case involving a claim already in litigation, GAO had set off a debt against an award under the Military Claims Act and the debtor sued

to recover the amount withheld. It turned out that the government's claim had been based largely on an oral contract which the debtor disputed. In view of the apparent weakness of the government's position, GAO recommended to the Justice Department that it "seek settlement on the best possible terms." B-202732, July 30, 1981 (non-decision letter).

Litigative probabilities also moved GAO to recommend compromise in B-229329, January 30, 1989. The Air Force had asserted a claim of $63,749.83 against a carrier for non-delivery of an "atomic clock" (glows in the dark?). However, the record revealed that the government might have difficulty proving delivery to the carrier. Also, there was some question as to whether the government had a duty to disclose the value of the article, and the amount of damages was open to question since the market for atomic clocks is not particularly large. The carrier had indicated a willingness to compromise for $15,040. In view of the various considerations noted, GAO recommended compromise on these terms.

In evaluating litigative probabilities, the agency should include in its consideration the possibility of an award of attorney's fees against it under the Equal Access to Justice Act if a court should determine that its position was not substantially justified. 4 C.F.R. § 103.3.

When this standard is being applied properly, the agency should be able to point to specific factors justifying the compromise conclusion, over and above the risk of losing which is present whenever one walks into court.

(3) Diminishing returns

An agency may compromise a claim if the cost of collecting it does not justify the enforced collection of the full amount. The agency should consider both the administrative and litigative costs of collection. 4 C.F.R. § 103.4.

Costs for purposes of section 103.4 may include the costs of administrative procedures required by law, such as hearings, but only when there is a substantial likelihood that they will actually be incurred in the particular case. 65 Comp. Gen. 893 (1986); 1984 preamble, 49 Fed. Reg. at 8895.

It is important to emphasize that compromise on the basis of cost effectiveness is discretionary, not mandatory. The concept should not be applied blindly. There will be situations in which cost effectiveness should

yield to other policy considerations. In this connection, the following portion of 4 C.F.R. § 103.4 is worth quoting:

> "Costs of collecting may be a substantial factor in the settlement of small claims, but normally will not carry great weight in the settlement of large claims. In determining whether the cost of collecting justifies enforced collection of the full amount, it is legitimate to consider the positive effect that enforced collection of some claims may have on the collection of other claims. Since debtors are more likely to pay when first requested to do so if an agency has a policy of vigorous collection of all claims, the fact that the cost of collection of any one claim may exceed the amount of the claim does not necessarily mean that the claim should be compromised. The practical benefits of vigorous collection of a small claim may include a demonstration to other debtors that resistance to payment is not likely to succeed."

In other words, while cost effectiveness is important, the agency's entire debt collection program will suffer if it develops the reputation of being an "easy mark."

c. Compromise and Accountable Officers

Two provisions of law stemming from the Federal Claims Collection Act of 1966 are relevant in connection with the liability of accountable officers.

First, agencies are not authorized to compromise a claim "arising out of an exception the Comptroller General makes" in an accountable officer's account. 31 U.S.C. § 3711(b). This includes a claim against the ultimate beneficiary of an improper payment. 4 C.F.R. § 103.1(a). Only the Comptroller General is authorized to compromise in this situation prior to referral to the Justice Department for litigation.

The term "exception" in the statute is construed in its general meaning as an objection raised by GAO to an item or items in an accountable officer's account. The particular form is irrelevant. See B-164729-O.M., April 17, 1969; B-115392-O.M., February 27, 1969; B-117604-O.M., March 24, 1967. Once GAO has raised an exception in an account, a purported compromise by the administrative agency will be legally ineffective. It does not bind the government, nor does it affect the liability of the accountable officer. B-117604.1-O.M., December 29, 1969; B-164729-O.M., April 17, 1969.

The statutory provision barring agency compromise in cases where GAO has raised an exception does not relieve the agency from continuing to pursue aggressive collection action on the debt. B-117604, January 3, 1968. Also, the provision bars only compromise; it does not preclude the agency

from exercising its authority to suspend or terminate collection action if otherwise appropriate. Id.

The second relevant provision is the second sentence of 31 U.S.C. § 3711(d), which provides that a compromise under section 3711 will operate to relieve the accountable officer. Thus, in improper payment cases, a compromise with the recipient or beneficiary will have the effect of relieving the accountable officer regardless of whether he or she would have been entitled to relief under the various relief statutes. This is an equitable result because the government's compromise effectively bars the accountable officer from pursuing recovery against the recipient.[37]

The authority to compromise with the recipient under the Federal Claims Collection Act does not depend on whether the accountable officer is entitled to relief under the applicable relief statutes. However, the probability of recouping the full amount of an improper payment from the accountable officer is a factor to consider in determining whether a compromise offer from the recipient is adequate. B-154400-O.M., January 29, 1968.

The operation of 31 U.S.C. § 3711(d) is illustrated in a Post Office case which arose prior to the Postal Reorganization Act of 1970. A local postmaster had been held liable for failure to assess and collect proper postage for second-class newspaper mailings. The (then) Post Office Department referred its claim against the newspaper to GAO for further collection action, and GAO accepted a compromise offer. By virtue of 31 U.S.C. § 3711(d), acceptance of the compromise relieved the postmaster of any further accountability for the uncollected amount of the deficiency. B-170841, December 5, 1972.

The "relief aspect" of 31 U.S.C. § 3711(d) applies by its terms only to compromises made under the authority of the Federal Claims Collection Act. However, GAO has applied the same policy to compromises made by the Justice Department under its general litigation authority. In B-156846-O.M., October 25, 1967, GAO had raised an exception to an improper payment and denied relief to the accountable officer under 31 U.S.C. § 3527. Subsequently, the government's claim against the recipient of the improper payment was referred to GAO as uncollectible, and then to the Justice Department. The Justice Department compromised the claim for 50 percent. GAO reviewed the cases prior to the Federal Claims Collection

[37]Prior to 1966, the rule had been that a compromise with the beneficiary did not affect the accountable officer's liability, although in several cases the equitable concerns moved GAO to grant relief. B-156846-O.M., October 25, 1967.

Act, some of which had held that the compromise operated to relieve the accountable officer, others that it did not, and decided that the policy expressed in section 3711(d) should apply here as well. Therefore, the compromise with the recipient was held to relieve the accountable officer from any liability for the balance. Since the matter had been referred to the Justice Department for litigation, the fact that a GAO exception was involved was, at that stage, irrelevant.

GAO followed the same approach in 65 Comp. Gen. 371 (1986), involving a compromise as part of a plea agreement in a criminal case. Several Corps of Engineers employees were found to have submitted fraudulent travel vouchers and the cases were referred to the Justice Department for criminal prosecution. The United States Attorney entered into a plea agreement under which the defendants agreed to partial repayment.[38] Payment under the plea agreements not only terminated the government claims against the defendants, but also removed any liability for the unpaid amounts on the part of the accountable officer who had certified the fraudulent payments.[39]

While compromise with the recipient of the improper payment effectively relieves the accountable officer, the converse is not true. Relief of the accountable officer does not affect the liability of the recipient. As discussed further in Chapter 9, 31 U.S.C. § 3527(d)(2) expressly provides that relieving the accountable officer does not relieve the recipient from liability, nor does it in any way diminish the government's responsibility to pursue collection action against the recipient.

d. Reporting to Internal Revenue Service

In some cases—and we emphasize in some cases—a compromise may result in taxable income to the debtor. There are two relevant sections of the Internal Revenue Code—26 U.S.C. §§ 61(a)(12) and 108. Section 61(a)(12) identifies "income from discharge of indebtedness" as a category of gross income. The concept itself is easy to state: "income may be realized by a taxpayer upon the cancellation of indebtedness and the amount canceled is then to be included in gross income." Meyer v. Commissioner, 383 F.2d 883, 888 (8th Cir. 1967). Indebtedness for federal tax purposes has been defined as "an unconditional and legally enforceable obligation for the payment of money." Commissioner v.

[38]Only the Justice Department may compromise claims involving fraud. 4 C.F.R. § 101.3(a).

[39]By virtue of 70 Comp. Gen. 463 (1991), liability in this type of case would now be computed differently. However, 65 Comp. Gen. 371 remains valid to illustrate the effect of compromise on the accountable officer.

McKay Products Corp., 178 F.2d 639, 644 (3rd Cir. 1949), cert. dismissed, 339 U.S. 961.

Section 108 of the Internal Revenue Code provides a number of significant exclusions. Some of them are:

- If the discharge occurs in a Title 11 (bankruptcy) case, or if it occurs when the taxpayer is insolvent, the discharged amount is not includible in gross income. 26 U.S.C. § 108(a)(1). Insolvency is given the traditional definition of "the excess of liabilities over the fair market value of assets." Id. § 108(d)(3).
- Discharge will not result in taxable income to the extent payment of the debt would have been tax deductible. Id. § 108(e)(2).
- Amendments in 1984 and 1986, codified at 26 U.S.C. §§ 108(f) and (g), provided exclusions for, respectively, student loan debts in cases where the individual is required to work for a certain period of time in certain professions, and for certain farm indebtedness.

There is no statutory requirement for creditor agencies to report discharged indebtedness to the Internal Revenue Service, nor was one included in the 1984 revision of the Federal Claims Collection Standards. See 1984 preamble, 49 Fed. Reg. at 8889. However, various OMB and Treasury publications require such reporting as a matter of executive branch policy. GAO has found, not surprisingly, that "information reporting" enhances taxpayer compliance. See GAO report, Tax Administration: Information Returns Can Improve Reporting of Forgiven Debts, GAO/GGD-93-42 (February 1993).

OMB first announced the requirement for federal agencies to report discharged indebtedness, starting with calendar year 1983, in a memorandum to all debt collection officials dated November 17, 1983 (Subject: Reporting Written-Off Debt to IRS). The requirement was subsequently incorporated into OMB Circular No. A-129.

Treasury's instructions are found in Managing Government Credit: A Supplement to the Treasury Financial Manual, Chapter 5. Agencies are instructed to report amounts discharged by compromise under the "inability to pay" or "diminishing returns" standards. Reporting is not required if the compromise is based on the "litigative probability" standard. Amounts greater than $600 must be reported; amounts of $600 or less may be reported, at the creditor agency's discretion. The discharge is reported on IRS Form 1099-G, a copy of which is furnished to the debtor.

9. Suspension and Termination of Collection Action

a. In General

Another important authority conferred by the Federal Claims Collection Act of 1966 is the authority to suspend or terminate collection action. As with compromise, the authority of the creditor agency to suspend or terminate applies only to claims whose principal amount does not exceed $100,000[40] and which have not been referred to another federal agency for further collection action. Also, the authority must be exercised in accordance with the Federal Claims Collection Standards. 31 U.S.C. § 3711(a)(3); 4 C.F.R. § 104.1; B-160506, April 10, 1970. GAO has the same authority as the agencies to suspend or terminate collection action on claims referred to it by other agencies. 31 U.S.C. § 3711(b).

For claims whose principal amount less any partial payments received exceeds $100,000, the authority to suspend or terminate rests with the Department of Justice (with one exception, to be discussed under "Termination"). 4 C.F.R. § 104.1(b); B-218989, January 27, 1986; B-215982, October 17, 1984. As with compromise, the agency should use the factors identified in the Standards to evaluate the matter. Justice Department approval is required only if the agency wants to exercise the authority, not if it decides against it. 4 C.F.R. § 104.1(b).

b. Suspension

Suspension is the temporary deferral of collection action. It is authorized by 31 U.S.C. § 3711(a)(3), which originated as part of section 3(b) of the Federal Claims Collection Act of 1966. The standards for suspension are found in 4 C.F.R. § 104.2. In some situations, suspension is mandatory; in others it is permissive or discretionary.

If there is an applicable statute providing for waiver or administrative review of the government's claim, and if that statute is "mandatory" in the sense that it prohibits recovery until the waiver or review decision has been made, then collection action must be suspended until the waiver or review process has run its course. 4 C.F.R. § 104.2(c)(1). The process "runs its course" when either of two things happens: (1) the agency actually considers a request from the debtor, or (2) the agency notifies the debtor of his or her right to seek waiver or review, and the debtor does not request it within the time period prescribed either in the statute or in the agency's implementing regulations. Id. The regulation in this regard is

[40]As with compromise, the ceiling was set at $20,000 in 1966 and was raised to $100,000 in 1990, with the Attorney General authorized to raise it further from time to time.

based on the Supreme Court's approval in Califano v. Yamasaki, 442 U.S. 682, 694 (1979), of the method used by the Social Security Administration in administering its mandatory waiver statute.

In all other situations, suspension is essentially discretionary. The Federal Claims Collection Standards authorize discretionary suspension in three broad situations.

(1) Inability to locate debtor

An agency may temporarily suspend collection action if, after diligent effort, it is unable to locate the debtor but believes that future possibilities justify periodic review and action on the claim. 4 C.F.R. § 104.2(a). The agency should liquidate any security it may be holding and, if the debtor has executed a confess-judgment note, should refer it for the entry of judgment. Id.

The regulation contemplates a diligent effort to locate the debtor and identifies several possible sources of assistance. Having a single letter returned by the post office normally isn't enough. 62 Comp. Gen. 91, 98–99 (1982).

(2) Debtor's financial condition

Collection action may be suspended if the debtor is financially unable to make reasonable installment payments or to compromise on reasonable terms but future prospects justify retention of the claim, and if the debtor owns no substantial equity in real or personal property against which collection can be enforced. 4 C.F.R. § 104.2(b). In addition, in order to justify suspension under this standard, one of the following factors should be present: the statute of limitations has been tolled or started running anew; a future offset opportunity will be available; or suspension is likely to enhance the debtor's ability to fully pay principal and interest at a later date. Id.

In 62 Comp. Gen. 599 (1983), applying an earlier but substantially similar version of this standard, GAO advised the Social Security Administration that proposed repayment agreements calling for an initial period of little or no payment, to be followed by a period of more substantial payments, were within the agency's discretion under section 104.2.

The future potential to collect by administrative offset is, by itself, not sufficient to justify suspension. It must be tied to an appropriate evaluation of the debtor's financial condition. 65 Comp. Gen. 245, 251 (1986).

(3) Permissive waiver/review statute

If there is an applicable statute providing for waiver or administrative review and the statute is "permissive" in the sense that it does not prohibit collection action pending consideration of a request for waiver or review, the agency may nevertheless suspend collection action based on "appropriate consideration," on a case-by-case basis, of three factors: (1) whether there is a reasonable possibility that the debtor's request will prevail; (2) whether there is reasonable assurance of recovery if the debtor does not prevail; and (3) whether collection would cause undue hardship. 4 C.F.R. § 104.2(c)(2). This standard was based largely on a Comptroller General decision, B-185466, August 19, 1976.

The regulation deliberately uses the somewhat vague term "appropriate consideration." The 1984 preamble offered the following explanation:

> "Exactly what constitutes 'appropriate consideration' may well vary from case to case. On the one hand, it is not necessary that all 3 factors be present in every case. On the other hand, however, suspension should not be automatic merely because any one of the three is present. The determination to suspend should balance the interests of the Government against fairness to the debtor. The determination should be reasonable in relation to the circumstances of the particular case, and it should be justifiable in terms of the specified factors." 49 Fed. Reg. at 8895.

For purposes of 4 C.F.R. § 104.2(c)(2), administrative review includes referral to GAO for advice or decision. 49 Fed. Reg. at 8895.

Another factor to consider in evaluating suspension under a permissive waiver or review statute is whether the applicable statutes and regulations would authorize the agency to refund payments to the debtor in the event the agency acts favorably on the debtor's request. If refund would not be authorized, collection action should be suspended without regard to the factors listed in subsection 104.2(c)(2), unless it seems clear that the request for waiver or review is frivolous (wholly without merit) or dilatory

(intended primarily to forestall collection). 4 C.F.R. § 104.2(c)(3); 1984 preamble, 49 Fed. Reg. at 8895.[41]

The Federal Labor Relations Authority has determined that the Federal Claims Collection Standards are governmentwide regulations for purposes of 5 U.S.C. § 7117. Accordingly, proposals for automatic suspension of collection action without regard to the factors identified in 4 C.F.R. § 104.2 are inconsistent with a governmentwide regulation and therefore not within an agency's duty to bargain. National Association of Government Employees, Local R1-109, 37 F.L.R.A. 500, 511–12 (1990); American Federation of Government Employees, AFL-CIO, Local 225, 15 F.L.R.A. 607 (1984).

c. Suspension Pending Congressional Action

Private relief legislation is used not only to authorize payments to claimants but also to relieve debtors of indebtedness. A question often asked is whether collection action must continue while Congress is considering a private relief bill. In the days when GAO had a much more active "accounts receivable" operation, GAO developed a policy in this area, independent of the Federal Claims Collection Standards, which we set forth here for consideration in appropriate cases.

In general, GAO's policy is to suspend collection action pending congressional consideration of private relief legislation, even though there is no requirement to do so. Suspension or abatement should not be automatic, however, but should be based on a request by the sponsor of the bill or an appropriate congressional committee, plus an administrative determination that the circumstances justify suspension. B-168579, February 17, 1970. Basically, in making its determination, the agency must evaluate present vs. future collection prospects.

Normally, suspension, where justified, is allowed until the end of the session of Congress in which the bill is introduced. Id.; B-168762, February 16, 1970; B-161734, July 7, 1967; B-161309, June 13, 1967. If the bill is introduced late in the session, collection action may abate until the end of the next full session. B-152680, October 28, 1966; B-159708, September 23, 1966.

If Congress has not acted on a particular relief bill during the session in which it was introduced, the repeated introduction of the same bill in future Congresses should not in itself form a basis for continuing

[41]This concept also stemmed from a number of prior GAO decisions. See, e.g., B-185466, August 19, 1976; B-184532, September 16, 1975; B-183863, July 18, 1975.

suspension of collection, especially if prompt collection action is considered necessary to protect the government's interests. B-168579, February 17, 1970. For example, if an accountable officer might also be liable, the agency should be careful not to lose that option through expiration of the 3-year statute of limitations in 31 U.S.C. § 3526(c). Id. However, GAO has agreed to continue suspension for one additional session where the bill passed the House but the Senate did not act during the session of introduction (B-161734, February 9, 1968), and in one case where Congress took no action (B-168762, February 17, 1971).

Although suspension is generally permissible only if relief legislation is actually before the Congress, GAO has not objected to suspension of collection action where a Member of Congress asked GAO to investigate and report on the basis of the government's claim, pending completion of the investigation and GAO's reply. B-159788, October 5, 1966.

d. Termination

(1) Standards for termination

Section 3(b) of the Federal Claims Collection Act of 1966, 31 U.S.C. § 3711(a)(3), authorizes the termination of collection action on debts whose principal amount does not exceed $100,000, "when it appears that no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount recovered." The specific criteria are found in the Federal Claims Collection Standards, 4 C.F.R. § 104.3.

The Standards are not merely guidelines. They establish the limits of agency authority. If the standards for compromise or termination cannot be met, and if the debt cannot be waived, the agency has no alternative but to pursue collection of the full amount of the debt. See, e.g., B-163495, February 23, 1968; B-160771, February 24, 1967; B-152680, October 28, 1966. Neither the statute nor the Standards permit termination merely because of the inability to collect within a reasonable time. B-117604-O.M., May 23, 1969.

Application of the Standards cannot be arbitrary. The agency must have adequate support for its decision to terminate. As the Comptroller General has stated, "it was not contemplated [in issuing the termination regulations] that any of these bases would be applied in the absence of detailed support of such application." B-117604.1, May 27, 1968.

If an agency is not sure whether collection on a particular claim should be suspended or terminated, it may refer the claim to GAO for advice. 4 C.F.R. § 104.4. If a significant enforcement policy is involved in a particular case, or if recovery of a judgment is a prerequisite to desired administrative sanctions, the agency may refer the claim for litigation even though it may otherwise qualify for termination. Id.

The Federal Claims Collection Standards provide five criteria for termination, the two specified in the statute plus three additional logical items added by the regulations:

1. Inability to collect any substantial amount. The agency may terminate collection action if the debtor is financially unable, both presently and prospectively, to pay any substantial amount on the claim. 4 C.F.R. § 104.3(a). For example, termination was justified where the government had obtained a default judgment but could not find any assets on which to levy, and there were other substantial unsatisfied judgments on record. B-161248-O.M., November 9, 1967. Receipt of government benefits does not automatically preclude termination under this standard. 62 Comp. Gen. 599, 604 (1983).

2. Cost will exceed recovery. The agency may terminate when it is likely that the cost of further collection action will exceed the amount recoverable. 4 C.F.R. § 104.3(c). This is the "diminishing returns" standard. As with the corresponding standard for compromise, the costs of hearings or other administrative procedures required by law may be included if there is a substantial likelihood that they will actually be incurred in the particular case. 65 Comp. Gen. 893 (1986).

3. Inability to locate debtor. The agency may terminate when the debtor cannot be located and either (1) there is no remaining security to be liquidated, or (2) the applicable statute of limitations has run and prospects for offset are too remote to justify retention. 4 C.F.R. § 104.3(b). E.g., B-180072-O.M., November 29, 1973.

4. Claim legally without merit. 4 C.F.R. § 104.3(d). A claim is legally without merit if there is no legal basis for recovery by the United States. 68 Comp. Gen. 609 (1989); B-218989, January 27, 1986. This standard is the one exception to the requirement to refer all claims over $100,000 to the Justice Department. If an agency determines that its original assertion of a claim was plainly erroneous, it may terminate collection action without Justice Department approval regardless of the amount of the claim. 4 C.F.R.

§ 104.1(b). If there is room for reasonable disagreement, Justice should be consulted.[42]

5. Claim cannot be substantiated by evidence. However good a claim may be in theory, if the agency has insufficient evidence to prove it (documentary evidence, witnesses, etc.) and the debtor refuses to pay or compromise, termination is appropriate. 4 C.F.R. § 104.3(e).

(2) Termination and federal employees

A thorny and frequently recurring question is whether the termination authority applies to debtors currently employed by the federal government. On the one hand, the argument goes, federal employees are people too, and should be governed by the same standards as nonfederal employees. On the other hand, however,—and wholly apart from any consideration of what should constitute appropriate conduct by a government employee[43]—a government employee has a steady paycheck and should always be able to repay a debt, at least in reasonable installments.

The statute and its legislative history do not address this issue. GAO has issued several decisions over the years which, at first glance, may not appear entirely consistent. They do, however, when viewed in the aggregate, stand for the proposition that (a) as a matter of law, the termination authority applies to federal employees, but (b) the various criteria specified in the Federal Claims Collection Standards must be examined individually as it will generally be more difficult for a federal employee to meet some of them.

Reviewing the criteria in the order listed in the preceding section, the first is inability to pay. GAO first considered the issue in B-159708, September 23, 1966, a response to a Member of Congress on behalf of a civilian employee of the Navy. The Comptroller General pointed out that the law required collection of the full amount of the indebtedness unless there was a showing that the employee was financially unable to pay "any significant sum" on the debt, an event GAO viewed as "unlikely" since the

[42]Letter dated March 11, 1969, from Assistant Attorney General William D. Ruckelshaus to Agency for International Development (copy on file with editors).

[43]A track record of failing to pay just debts may support a different type of termination—termination of employment. E.g., Dennis v. Blount, 497 F.2d 1305 (9th Cir. 1974). Whether an agency can discharge an employee for failure to pay a single debt is questionable. Id. at 1307–08; White v. Bloomberg, 345 F. Supp. 133, 143–48 (D. Md. 1972). Regardless of the number of debts, filing for bankruptcy will protect the employee from being fired. 11 U.S.C. § 525(a).

debtor was employed by the government. Thus, while the Comptroller General stopped short of expressing a definitive position, he seemed to be saying that the "inability to pay" standard applies to federal employees just as to any other debtor, but that a federal employee would rarely, if ever, be able to qualify under that standard. See also 49 Comp. Gen. 359, 361 (1969); B-163495, February 23, 1968; B-160569, February 28, 1967.

GAO concluded that termination was unauthorized in B-160633, January 19, 1967, a case involving an Air Force employee who had erroneously been paid overtime compensation. The decision held that there was no authority to discontinue collection action since the debtor "currently is employed and there is no showing of his inability to repay the amount in question." Again, the implication was that the standard applies as a matter of law but that someone receiving a government paycheck is presumptively unable to meet it.[44]

In B-172122-O.M., May 21, 1971, GAO's General Counsel advised the GAO Claims Group that "the present debt should not be terminated or suspended . . . so long as the employee occupies his present position and has a take home pay of $980 a month after tax withholding in addition to his retired military pay." In B-175499, April 21, 1972, overruled on other grounds by 69 Comp. Gen. 72 (1989), GAO held that a particular overpayment could not be waived under 5 U.S.C. § 5584 but advised the agency to consider the various alternatives under the Federal Claims Collection Act, one of which is termination. In that particular case, however, the employee was in the process of resigning and was in a "leave without pay" status.

The cases noted above all involved overpayments or erroneous payments made directly to the debtor. In one case, GAO considered whether termination was available on behalf of an accountable officer where GAO had previously denied relief. Reviewing several of the earlier cases, GAO expressed a general rule that termination is unauthorized where the debtor is currently employed by the government. However, in view of the history of that particular case and the financial hardship which had been demonstrated, GAO advised that no further collection action need be taken. The case was clearly viewed as an exception. B-180957-O.M., September 25, 1979.

[44]The decision makes no mention of the possibility of waiver since 5 U.S.C. § 5584 was not enacted until the following year.

Thus, in the typical case, it will be difficult at best for a federal employee to qualify for termination under the "inability to pay" standard. The rationale is that the employee cannot legitimately be deemed unable to pay, at least in reasonable installments, where he or she is receiving a steady government paycheck. In many financial hardship cases, if a reasonable installment plan is not feasible, suspension will be the more appropriate course of action. There is, however, no rule of law which prohibits termination if the standard, fairly applied, is satisfied.

The next standard is "diminishing returns." Prior to the Debt Collection Act of 1982, the decisions had consistently held that termination on this basis was unauthorized where salary offset under 5 U.S.C. § 5514 was an available remedy. B-195471, October 26, 1979; B-189701, September 23, 1977; B-180674, November 25, 1974; B-160483, December 9, 1966. See also B-195322, November 27, 1979. When these decisions were rendered, the cost of taking a salary offset was negligible. The process involved little more than contacting the payroll office. Thus, a "diminishing returns" standard would have little application. However, the Debt Collection Act of 1982 changed the rules by requiring various procedural measures in connection with taking an offset.

The post-1982 offset environment caused GAO to reconsider its position. The new rule is that agencies may—but are not required to—take into consideration the costs of administrative procedures required by law when applying the "diminishing returns" standard to any debtor, federal employees included, if there is a substantial likelihood that the costs will actually be incurred in the particular case. 65 Comp. Gen. 893 (1986). As with compromise, the decision cautioned that cost effectiveness is only one factor in the equation:

> "[T]here may be cases in which sound countervailing Government policies dictate that collection be attempted, despite the costs. For example, it may be desirable for the agency to disregard the costs of collection when it wishes to 'set an example,' and thereby discourage or deter other persons from incurring similar debts or resisting payment of them." Id. at 897.

The three remaining termination standards are easily addressed. It is difficult to see how "inability to locate debtor" could ever apply to a person on the federal payroll. As to the final two—claim legally without merit and lack of evidence—there is no reason why these should not apply fully to debts asserted against federal employees.

(3) Categorical termination

As we have seen, one of the standards for termination is the concept of "diminishing returns." When the cost of collection is likely to exceed the amount recoverable, collection action may be terminated. 4 C.F.R. § 104.3(c). Generally speaking, the termination authority contemplates situations where the agency has already started collection action. 58 Comp. Gen. 372, 374 (1979). There are situations, however, where GAO has construed the Federal Claims Collection Act as permitting an agency to simply forgo collection action before it was actually initiated.

Even before the Federal Claims Collection Act, GAO had advocated that agencies establish realistic points of diminishing returns for their collection activities. E.g., 45 Comp. Gen. 553 (1966). This advice today is found in the Federal Claims Collection Standards, specifically 4 C.F.R. § 102.14, which encourages agencies to use cost benefit analyses to:

"establish guidelines with respect to points at which costs of further collection efforts are likely to exceed recoveries, . . . and establish minimum debt amounts below which collection efforts need not be taken."

See also GAO's Policy and Procedures Manual for Guidance of Federal Agencies (GAO-PPM), title 4, § 69.3.

Note that we are dealing with two separate but nevertheless closely related concepts here: (1) minimum debt amounts, which are thresholds below which collection action need not be initiated, and (2) points of diminishing returns, which are thresholds at which the agency may discontinue collection efforts already started. See 65 Comp. Gen. 893, 896 (1986). For purposes of this discussion, we use the term "categorical termination" to encompass both.

Under the Federal Claims Collection Act and Standards, the rule has developed that an agency may establish reasonable minimum amounts for the pursuit of debt claims of particular types, and reasonable points of diminishing returns beyond which collection action need not be continued. The amounts cannot be arbitrary but must be supported by cost studies. The studies should analyze average recovery rates in relation to the size of the debt, the average cost of collection actions applicable to that type of claim, and the apparent possibilities of collection. 4 GAO-PPM § 69.3. There is no requirement for GAO approval. These amounts are,

however, subject to review under GAO's regular audit authority. 55 Comp. Gen. 1438, 1439 (1976).

For example, based on cost figures supplied by the General Services Administration, GAO approved a $25 minimum for the filing of loss and damage claims against carriers, including small domestic shipments on commercial forms. 55 Comp. Gen. 1438 (1976). The decision noted that an agency is authorized but not required to observe the minimum, and would retain the option to file a claim in a particular case. Similarly, the Agriculture Department could establish a $35 minimum for the collection of small claims. B-3338, January 11, 1972.

In B-117604, March 6, 1972, based on cost studies conducted by various services, the Comptroller General approved a proposal by the Defense Department to set a $25 minimum on pursuing out-of-service indebtedness claims. A few years later, Defense sought to establish a "floating minimum" or, in the alternative, raise the minimum to $150. While GAO approved the proposal in principle, differences in the findings and accounting concepts among the various services led GAO to conclude that the specific request was not adequately supported. Accordingly, until the cost studies by the various services showed a coordinated and reasonably consistent basis, GAO could not endorse the change. B-115800/B-117604, August 17, 1976.

The authority recognized in this line of decisions applies to claims discovered after the fact. An agency may not "waive" recovery in advance, that is, where the potential overpayment is known or can be readily determined before the payment is made. 49 Comp. Gen. 359 (1969).

Cost benefit analyses do have limitations, as pointed out in the following excerpt from B-197146, September 22, 1980:

> "For example, low collection rates and high collection costs may be symptoms of ineffective and inefficient collection techniques, which if improved, would require a reevaluation of minimums previously established. Also cost benefit analyses should not always be the sole determinant for the termination of claims. Other factors, which are not easily quantifiable, such as maintaining the integrity of a collection program, should also be considered."

While, as we have already noted, the costs of administrative hearings and reviews may be considered when evaluating termination of individual claims under 4 C.F.R. § 104.3(c), they should not be used in establishing

categorical minimum debt amounts or points of diminishing returns. 65 Comp. Gen. 893 (1986). The practical rationale behind this position should be apparent. If you announce up front that you will not pursue collection action on debts of a particular type under, say, $1,000, you virtually eliminate any incentive for voluntary payment.

There are two exceptions to the requirement for cost studies. The first is for nominal amounts. In 58 Comp. Gen. 372 (1979), the Interior Department asked whether, under the Federal Claims Collection Act, it could forgo collection action on underpayments of $1 or less of reclamation fees paid by coal mine operators under the Surface Mining Control and Reclamation Act of 1977. The Comptroller General noted that "it may safely be presumed, without cost studies, that in cases of $1 or less collection action will always exceed the amount recoverable." Id. at 375. Therefore, construing the termination provision in the Federal Claims Collection Act in light of its purpose, the Comptroller General held that Interior could make a categorical determination to forgo collection action on underpayments of $1 or less, based on the diminishing returns concept, without the need for cost studies. See also 18 Comp. Gen. 838 (1939) ($1); B-134617, January 30, 1958 ($2). The rule applies equally to debts owed by federal civilian and military personnel. 65 Comp. Gen. 893 (1986).

The second exception involves claims against a group or class of persons where the individual amounts are small, the administrative burden of identifying the debtors and computing the amounts would be disproportionately high, and the individual claims would be eligible for waiver consideration. The first case in point was B-181467, July 29, 1976. The Air Force discovered that it had been overpaying night differential and Sunday premium pay to local employees at Clark Air Base in the Philippines. Since (1) the amount of the individual debts was minor, (2) the administrative costs of identifying the overpayments would have been excessive, and (3) the individual debts would have been eligible for waiver anyway, GAO concluded that the Air Force could terminate collection action. This decision was followed in B-188000, October 12, 1977, and again in B-184947, March 21, 1978.

The most recent decision on this point, B-206699.1/B-206699.2, September 15, 1988, jointly considered two separate problems. In the first case, the Air Force uncovered erroneous overpayments of compensation over a one-year period to nearly 5,000 National Guard technicians. In the second case, the Army undertook a project to reconcile personnel and pay records and discovered minor discrepancies that had resulted in small

overpayments to approximately 10,000 persons. In both cases, it was established that the individual debts were small, administrative costs of identification and collection would be excessively disproportionate, and the individual cases would be subject to consideration for waiver. In both cases, GAO agreed with agency proposals to forgo collection action.

e. Write-off and Close-out

Termination, write-off, and close-out are three different things. Termination, discussed above, refers to the creditor agency's decision to discontinue active collection efforts. Once the decision to terminate collection action has been made, the logical next step is to remove the debt from the agency's accounting records, i.e., to stop carrying it as a receivable. This step is called write-off. Thus, the proper terminology is: you terminate collection action, and then you write off the debt from your receivables.

Termination and write-off occur either simultaneously or in very close time proximity. Since it is undesirable to carry an active receivable on which no further action is being taken or contemplated, there should be no significant delay between termination and write-off.

The concept of write-off applies equally to a judgment debt which has, to the agency's reasonable satisfaction, become uncollectible. 34 Comp. Gen. 148 (1954). There is no need to first attempt execution on the judgment where the facts indicate it would not be warranted. B-120956, October 6, 1955.

The acts of termination and write-off do not preclude re-opening the case if future collection possibilities are discovered. For example, if you see your debtor's smiling face on the evening news holding the winning lottery ticket, you may want to consider reactivating the file. In the more typical situation, of course, an offset opportunity presents itself that was not contemplated at the time of write-off. The principle was stated in 48 Comp. Gen. 365, 369 (1968):

> "Concerning the legality of taking action to satisfy an indebtedness once it has been declared uncollectible, it appears that an administrative determination of uncollectibility is for accounting purposes only and, as such, does not preclude the subsequent satisfaction of the indebtedness should the opportunity to do so thereafter be presented to the administrative office."

See also GAO Policy and Procedures Manual for Guidance of Federal Agencies, title 4, § 70.6; B-182512-O.M., August 6, 1975.

Largely within their discretion, agencies may retain administrative records (as opposed to accounting records) of inactive debt accounts for possible future reactivation, and may do so indefinitely.

At some point, the agency may determine that even retaining an inactive record is futile. At this point, the agency closes out the debt. Close-out is the agency's final disposition of the debt. Depending on the circumstances, write-off and close-out may occur at the same time, or write-off may precede close-out by a potentially substantial amount of time.

Once the debt is closed out, it should be reported to the Internal Revenue Service on Form 1099-G under the authorities previously discussed in connection with compromise.

Close-out precludes reactivation of the account. The agency may still accept voluntary payments, but may no longer take any further collection action. A written-off account is inactive; a closed-out account is dead.

Further discussion and guidance on the concepts of write-off and close-out may be found in: OMB Circular No. A-129, Managing Federal Credit Programs; Managing Government Credit: A Supplement to the Treasury Financial Manual, chapter 5; and Treasury Financial Management Service, The Governmentwide Task Force Final Report on Write-Off (August 1988).

10. Waiver

If one private individual owes a debt to another, the creditor might decide, for any number of reasons, that it "just isn't right" to enforce collection. A federal agency, as we have seen, is not free to do the same thing. The agency must attempt collection unless that duty is removed in some legally authorized manner. Yet, as we also noted earlier, increasing the ranks of the homeless is not one of the objectives of federal debt collection. We have already discussed some of the ways Congress has provided to relieve an agency of its duty to attempt collection in full in appropriate circumstances, specifically compromise and termination. One more should be noted—waiver.

"Waiver" of a debt is a forgiveness of the debt and relieves the debtor from having to repay it. It has been defined as "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938); 43 Comp. Gen. 311, 314 (1963); B-195188, June 17, 1981. It differs from termination in that termination does not eliminate the debtor's

liability whereas a debt which has been waived no longer exists and cannot be reopened.

Since waiver amounts to the giving away of government rights or property, it requires statutory authority. Absent a statutory basis, no federal agency is authorized to waive a debt claim owing to the United States. For example, a 1971 decision concluded that the Labor Department was not authorized to waive the recovery of overpayments made under the Disaster Relief Act of 1970. B-171934, April 2, 1971. Similarly, the Federal Emergency Management Agency lacks authority to issue regulations providing for the forgiveness of debts owed to the government. B-201054, April 27, 1981. Along the same lines, the compromise, suspension, and termination authority of the Federal Claims Collection Act applies to overpayments by the Department of Labor under the Redwood Employee Protection Program although there would be no authority to "waive" the claims. B-195188, June 17, 1981.

Neither the Federal Claims Collection Act of 1966 nor the Debt Collection Act of 1982 authorizes anyone (the creditor agency, GAO, or the Justice Department) to waive debt claims. E.g., B-159708, September 23, 1966. Congress has, however, authorized waiver in a number of specific contexts.

Waiver statutes are classified as either mandatory or permissive. See Califano v. Yamasaki, 442 U.S. 682, 693 n.9 (1979). A typical mandatory statute is the Social Security Administration's waiver statute, 42 U.S.C. § 404(b), which was the subject of the Yamasaki decision:

> "In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of [the old-age, survivors, or disability insurance programs] or would be against equity and good conscience."[45]

The essence of a mandatory waiver statute is that the agency has a "duty to decide" (Yamasaki, 442 U.S. at 694 n.9) and recovery is prohibited until the decision has been made. The decision may be an actual decision on the merits, or it may take place by default. To illustrate, the Supreme Court in Yamasaki expressly approved the way the Social Security Administration administered 42 U.S.C. § 404(b). In each overpayment case, SSA would send

[45]The "without fault" and "equity and good conscience" standards are common to most waiver statutes, both mandatory and permissive.

a notice to the recipient advising of his or her right to request waiver. If the recipient made a request, SSA would consider the merits and make a decision. Failure to submit a request within the time limit prescribed by regulation was tantamount to a denial. 442 U.S. at 694.

Other mandatory waiver statutes will generally resemble the SSA provision. Several are cited in Yamasaki, 442 U.S. at 694 n.9. Sometimes it is not quite so clear. One example, described in 63 Comp. Gen. 10, 13 (1983), is found in the Black Lung Benefit Program legislation. Under 30 U.S.C. § 940, amendments made by the Black Lung Benefits Act of 1972 with respect to claims filed on or before December 31, 1973, also apply to claims filed after that date. The 1972 act had amended 30 U.S.C. § 923(b) to make section 204 of the Social Security Act applicable to the Black Lung Program. Section 204 is 42 U.S.C. § 404, the very provision the Supreme Court had considered in Yamasaki. Thus, post-1973 black lung benefit claims are subject to a mandatory waiver statute.

Another example described in 63 Comp. Gen. 10, 14, is the waiver provision of the Federal Employees' Compensation Act, 5 U.S.C. § 8129(b):

> "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

This looks very much like the SSA statute but the wording is not identical. Title 5 was recodified in 1966. The pre-1966 language was "there shall be no adjustment or recovery" (63 Stat. 864), the same as the SSA provision. Since recodifications are not intended to make substantive changes, this too is clearly a mandatory waiver statute.[46]

Where a mandatory waiver statute applies, notice of the right to request waiver should be included in agency's first demand letter.

Under a permissive or discretionary waiver statute, recovery is not prohibited pending the waiver determination. A common example is 5 U.S.C. § 5584, under which erroneous payments to civilian employees of pay and allowances, including travel, transportation, and relocation payments, "may be waived in whole or in part" by the agency for claims of $1,500 or less ($10,000 or less for the judicial branch), or by GAO for claims

[46]As this example shows, resort to the original source statute is often helpful in understanding a recodified statute.

exceeding $1,500,[47] when the recipient is without fault and when collection "would be against equity and good conscience and not in the best interests of the United States." GAO has issued implementing regulations, found at 4 C.F.R. Parts 91 and 92, most recently reissued on September 30, 1991 (56 Fed. Reg. 49582). The statute comes into play only when there has been an actual payment for which an employee is indebted to the government; it does not authorize the waiver of erroneous advice. 66 Comp. Gen. 642 (1987). Detailed coverage of 5 U.S.C. § 5584 may be found in GAO's Civilian Personnel Law Manual.

Other examples of permissive waiver statutes are:

- 10 U.S.C. § 2774: same as 5 U.S.C. § 5584, but for military personnel.[48]
- 32 U.S.C. § 716: same as 5 U.S.C. § 5584, but for National Guard personnel.
- 5 U.S.C. § 4108(c): Government Employees Training Act.
- 10 U.S.C. § 1453: Survivor Benefit Plan (military).

In the case of some government corporations, waiver authority, although not explicitly granted, follows from their broad statutory charter. E.g., B-190806, April 13, 1978 (Pension Benefit Guaranty Corporation).

The waiver statutes, at least those GAO helps administer, contemplate considering the circumstances of individual cases. Thus, GAO has been reluctant to grant "blanket waivers." One exception is B-222776, June 16, 1986. Legislation enacted in 1986 retroactively changed the formula for computing the hourly rate of pay for federal employees. The result was a small overpayment for most civilian employees (e.g., 6 cents an hour for a GS-13). In response to a request from the Chairman of the House Post Office and Civil Service Committee, GAO concluded that this was an appropriate situation to grant a blanket waiver for all affected employees.

In our preceding discussion of suspension of collection action, we noted that one of the relevant factors identified in the Federal Claims Collection Standards is whether refund would be authorized. Some waiver statutes provide for refund of amounts already collected if the waiver is granted. E.g., 5 U.S.C. § 5584(c). Others do not. See, e.g., 51 Comp. Gen. 419, 422 (1972), with respect to the waiver provision of the Government Employees Training Act. Under a waiver statute which does not authorize refund,

[47]The threshold in 5 U.S.C. § 5584, 10 U.S.C. § 2774, and 32 U.S.C. § 716 was raised from $500 to $1,500 by Pub. L. No. 102–190, § 657, 105 Stat. 1290, 1393 (1991).

[48]The discretionary nature of 10 U.S.C. § 2774 is discussed in Price v. United States, 621 F.2d 418 (Ct. Cl. 1980). Since the statutes are virtually identical, the discussion in Price would apply to 5 U.S.C. § 5584 and 32 U.S.C. § 716.

waiver may be ineffective with respect to amounts already paid because waiver is the relinquishment of an existing right, and to the extent payment has already been made, there is no longer a debt and therefore nothing to waive. Id.

In B-146111, July 6, 1961, an employee of the Federal Aviation Agency had received training under the Government Employees Training Act, had signed an agreement to continue working for the FAA for a specified time, and then resigned in violation of the agreement. The FAA recovered the training expenses from the individual and deposited the money in the Treasury as miscellaneous receipts. Seven months later, the individual rejoined the agency. The agency wanted to waive the debt under 5 U.S.C. § 4108(c) and refund the amount recovered. Since the collection and deposit had been entirely proper when made, the permanent appropriation for refunding money "erroneously received and covered" (31 U.S.C. § 1322(b)(2)) could not be used, and there was no other authority to make the refund.

GAO considered a similar fact pattern in B-208064, November 15, 1983. As in B-146111, the question was whether the agency could refund amounts previously collected upon the debtor's re-employment. Part of the debt had been collected by offset against salary and leave payments due at the time of resignation. Essentially following 51 Comp. Gen. 419, GAO concluded that this amount could not be refunded. With respect to the remaining portion of the debt, the agency had contacted the Office of Personnel Management to collect from the debtor's Civil Service Retirement Fund account. However, the agency did not actually receive the money from OPM until after the debtor had become re-employed. The decision held that this portion could be refunded since it had not been "collected" at the time of waiver.

The Supreme Court's Yamasaki decision, and those portions of the Federal Claims Collection Standards which apply it, have altered the rules of some of the earlier decisions. For example, one of the precedents cited in 51 Comp. Gen. 419 for the proposition that waiver is ineffective where the debt has already been extinguished is 8 Comp. Gen. 664 (1929). That case, however, involved what is clearly a mandatory waiver statute. If the question in 8 Comp. Gen. 664 arose today, the answer would be that recovery should not have been made prior to the waiver decision. If the debt had been collected prior to the waiver decision and the money deposited as miscellaneous receipts, the collection would be erroneous and could be refunded using the "erroneously received and covered"

appropriation. E.g., 71 Comp. Gen. 464 (1992). Thus, for the most part, if the waiver statute is mandatory, it no longer makes a difference whether the statute itself authorizes refund in view of Yamasaki and the mandatory suspension provision of 4 C.F.R. § 104.2(c).

If the waiver statute is permissive, lack of refund authority can still present a problem, as in 51 Comp. Gen. 419, although careful application of the suspension standards will eliminate the problem in most cases. We say "most cases" because, for example, in B-146111, July 6, 1961, suspension could not have been justified at the time the debt was collected. A possible solution, at least in offset cases, may be a bit of sleight-of-hand suggested in A-27376, March 12, 1930, and noted in B-146111, cited above—a "tentative withholding" pending the waiver decision, as opposed to an "offset tantamount to recovery." An agency following this approach should not credit any of the "tentative withholding" to miscellaneous receipts prior to the waiver decision.

11. Payment

a. Modes of Payment

(1) Cash

United States coins and currency are legal tender for all debts. 31 U.S.C. § 5103. Thus, cash payments should generally be acceptable. Postage stamps are not currency and generally not acceptable in payment, although acceptance is not legally prohibited where the agency has some practical means of converting the stamps to cash. A-51645, October 19, 1937, at 7.

The rare situation may occur in which cash payment turns out to be no payment at all. To illustrate, we turn to "the strange case of Dr. Alm." In 1972, Dr. Donald J. Alm was a dentist in Eau Claire, Wisconsin, presumably with no particular involvement with the federal government. In March of that year, his minor son was kidnapped. Dr. Alm paid a ransom of $50,000 in $5, $10, and $20 bills, and his son was fortunately returned unharmed.

The day after the ransom payment, someone named Diffie drove his truck to the offices of the Farmers Home Administration in Alma, Wisconsin, carried in a suitcase filled with stacks of $10 and $20 bills, and used the money to repay a $20,000 loan. Two days later, Diffie was arrested and charged with the kidnapping. He pleaded guilty and, along with two

accomplices, was sent to jail. The cash used to pay the Farmers Home loan was confirmed to be part of the ransom money. Dr. Alm, naturally, asked the FmHA to return his money.

Of course, life is not that simple. There is a rule that a party who accepts cash in the normal course of business, without actual or constructive knowledge that it was illegally obtained, is not required to return it. The rule is premised on the need for certainty in business dealings. E.g., Holly v. Missionary Society, 180 U.S. 284, 293 (1901). Or, put another way, where the equities are equal, the law will not transfer a loss from one innocent party to another, but will leave it where it falls. Id. at 295.

This was little comfort to Dr. Alm, who had done absolutely nothing wrong. GAO reviewed the case at the request of the House Judiciary Committee, and suggested that there might be a way out. The rule noted above is based on the receipt of cash in due course, and "there are few conceivable circumstances more out of harmony with a concept of due course" than the "bizarre factual context presented here." Thus, the facts did not require strict application of the rule. B-177344, April 20, 1973. FmHA apparently agreed and returned the money. The Court of Claims subsequently confirmed what all had conceded—that Dr. Alm did not have a legal claim against the government. Whether he had an equitable claim was mooted by the return of the money. Alm v. United States, 204 Ct. Cl. 791 (1974).

(2) Check

There is no general prohibition on the acceptance of personal checks. If payment is tendered in the form of a personal check, it should be made clear that the check is being accepted subject to collection only. This protects the collecting officer from liability if the check should "bounce." See 3 Comp. Gen. 403 (1924); B-201673 et al., September 23, 1982. In other words, it should be made clear that it is the collection of funds on the check that satisfies the obligation and not the mere acceptance of the check itself. I Treasury Financial Manual § 5-2010.

In the absence of legislation one way or the other, an agency is presumably free to issue regulations imposing limitations on the use of personal checks, for example, by requiring certified or cashier's checks for payments in excess of a specified amount.

(3) Credit cards

Except where expressly prohibited, a federal agency may accept commercial credit card transactions in payment for goods and services provided by the government or in payment of debts, subject to certain safeguards.[49] Acceptance of payment by credit card:

- should not result in any significant increase in cost to the government;
- should facilitate and enhance the agency's collection activities; and
- should protect the government by means of credit card company guarantees to reimburse the government for all properly conducted transactions.

67 Comp. Gen. 48 (1987) (general discussion); B-219322-O.M., September 25, 1986 (same). See also 56 Comp. Gen. 90 (1976) (credit sales by Government Printing Office); 52 Comp. Gen. 764 (1973) (purchases from National Technical Information Service); B-230374-O.M., February 23, 1988 (coin sales by U.S. Mint under Statue of Liberty-Ellis Island Commemorative Coin Act).

As the decisions cited in the preceding paragraph also note, acceptance of credit cards should also not result in increased cost to the person making the payment. The exception would be where a credit card is being used to pay a delinquent debt, in which case the credit card company's commission may be treated as an administrative cost to be assessed against the debtor under 31 U.S.C. § 3717(e)(1). 67 Comp. Gen. at 49 n.1.

There is one potential drawback to the use of credit cards. In the typical commercial arrangement, the credit card company deducts its fee from the amount to be paid over to the vendor. However, federal agencies are required by 31 U.S.C. § 3302(b) to deposit collections in the Treasury without deduction. Thus, unless the transaction is somehow exempt from 31 U.S.C. § 3302(b), agencies are not authorized to enter into this type of arrangement. 67 Comp. Gen. 48 (1987). For delinquent debts, an exemption exists by virtue of 31 U.S.C. § 3718(d), previously noted under the heading "Commercial Collection Agencies." 67 Comp. Gen. at 50. There is, however, no comparable blanket exemption for non-delinquent payments. GAO supports expanding the concept of 31 U.S.C. § 3718(d) to encompass non-delinquent payments. Id. at 52.

[49]For a brief history and description of the use of credit cards in the United States, see National Bancard Corp. v. VISA U.S.A., Inc., 596 F. Supp. 1231, 1236–39 (S.D. Fla. 1984).

The Treasury Department has negotiated an arrangement with a number of financial institutions to accept credit card payments to federal agencies. The system is called the Credit Card Collection Network and is described in the Treasury Financial Manual, I TFM Chapter 5-4700. By offering a convenient credit card payment option, the Treasury program is designed to enhance agency collections.

(4) Payment in kind

The Federal Claims Collection Act and Standards generally contemplate payment in money. One provision of the Federal Claims Collection Standards, 4 C.F.R. § 103.9, prohibits accepting a percentage of a debtor's profits or stock in a debtor corporation in compromise of a claim. Apart from this, however, there is no blanket prohibition on accepting payment in kind, at least under a compromise. See generally 37 Op. Att'y Gen. 298 (1933); B-229068.4, August 3, 1988. Of course, this assumes the absence of any other statutory restriction or prohibition applicable to the particular case. An agency proposing to accept payment in kind should exercise common sense and should be careful to assure that the property, when reduced to cash, will provide adequate payment. B-229068.4 at 6.

A 1935 decision in which compromise was not involved held that there is no authority to accept a debtor's offer of merchandise to satisfy a government claim. 14 Comp. Gen. 884 (1935).

(5) Cash Management Improvements Fund

A provision in the Deficit Reduction Act of 1984 (Pub. L. No. 98–369), codified at 31 U.S.C. § 3720, requires executive agencies, in accordance with Treasury Department regulations, to provide for the timely collection and deposit of funds owed to the agency, using such procedures as electronic fund transfer, automatic withdrawals, and post office lockboxes. The objective is to expedite the availability of funds to the Treasury through improved cash management.

If an agency fails to comply with Treasury requirements, the Treasury Department is authorized to charge the agency with the cost to the general fund caused by the noncompliance. Payment of these charges is to come from agency operating appropriations. Noncompliance charges collected by Treasury under 31 U.S.C. § 3720 go into the Cash Management Improvements Fund, a revolving fund available without fiscal year limitation to fund selected cash management improvement projects.

Further detail may be found in the Treasury Department's implementing regulations, 31 C.F.R. Part 206.

b. Multiple Debts

Suppose a debtor owes more than one debt to the United States and makes a voluntary payment which may or may not be enough to satisfy one of the debts. How should the government apply the payment?

There is a long-established principle of commercial law to the effect that if a debtor owing more than one debt to the same creditor makes a voluntary payment and designates how it is to be applied, the creditor must follow that designation. If the debtor fails to designate the application of the payment, then the creditor may do so within its discretion. The Supreme Court stated the principle over a century ago as follows:

> "The rule settled by this court as to the application of payment is, that the debtor or party paying the money may, if he chooses to do so, direct its appropriation; if he fail, the right devolves upon the creditor; if he fail, the law will make the application according to its own notions of justice."

National Bank of the Commonwealth v. Mechanics' Nat'l Bank, 94 U.S. 437, 439 (1876). The rule "rests upon the concept that the money which the debtor is utilizing to make the payment is his own and is free for use as he pleases." St. Paul Fire and Marine Ins. Co. v. United States ex rel. Dakota Elec. Supply Co., 309 F.2d 22, 25 (8th Cir. 1962).

The Federal Claims Collection Standards adopt this rule. 4 C.F.R. § 102.11(b). If the debtor fails to designate the application of a voluntary payment, agencies are cautioned to "apply payments to the various debts in accordance with the best interests of the United States, as determined by the facts and circumstances of the particular case, paying special attention to applicable statutes of limitations." Id. Thus, as a general proposition, an undesignated voluntary payment should be applied first to a debt on which the statute of limitations is approaching expiration. While the Standards place the "freedom of application" rule in the section on installment payments, the rule applies to voluntary payments generally and not just to installment payments.

If a debt is collected by administrative offset, payment is not voluntary and the "freedom of application" rule does not apply. In this situation, agencies are instructed to apply recovered amounts "in accordance with the best interests of the United States, as determined by the facts and circumstances of the particular case, paying special attention to applicable

statutes of limitations." 4 C.F.R. § 102.3(g). Payment under a tax levy is similarly involuntary and the taxpayer cannot direct its application. Muntwyler v. United States, 703 F.2d 1030 (7th Cir. 1983); Jung v. United States, 701 F. Supp. 175 (E.D. Wis. 1988).

c. Conditional Endorsements

Problem: Debtor owes agency $1,000. Debtor submits check for $500, and writes "payment in full" on the check, either on the "memo" line or on the back. If the agency keeps the money, has it agreed to the debtor's condition and discharged the remaining $500? Answer: maybe, maybe not. It depends on whether the transaction constitutes what the lawyers call an "accord and satisfaction." The term "accord and satisfaction" means, in essence, an agreement to accept in full payment an amount less than the amount claimed, coupled with the actual payment of the agreed-upon amount. Since it is contractual in nature, it requires mutual assent and consideration to be valid. 40 Comp. Gen. 261, 264–65 (1960).

An early GAO decision, somewhat short on analysis, took the easy way out and held that there was no authority for the government to accept a check bearing a conditional (full payment) endorsement. 15 Comp. Gen. 1072 (1936). Subsequent decisions took the huge leap of concluding that 15 Comp. Gen. 1072 did not apply where the check was in the amount which the creditor agency had determined to be due. 29 Comp. Gen. 88 (1949); A-74922, October 6, 1936, modifying 15 Comp. Gen. 1072. In other words, it's OK to say "payment in full" when you're in fact making payment in full. These cases suggest that the real concern was the unauthorized acceptance of a compromise.

Of course, as we have seen, the Federal Claims Collection Act of 1966 provided across-the-board compromise authority. In a 1969 internal memorandum, the Comptroller General effectively overruled 15 Comp. Gen. 1072. A-74922-O.M., October 30, 1969. ("[I]n view of the . . . Federal Claims Collection Act of 1966 . . . [we do not] consider our decision of 15 Comp. Gen. 1072 . . . to be currently effective to preclude the acceptance of checks bearing conditional endorsements.") Unfortunately, the memorandum offered no further guidance except to suggest that a check with a conditional endorsement may be temporarily withheld from deposit in the Treasury to give the agency the opportunity to figure out what to do.

The law on this point at the present time appears to be reflected in the cases of Chesapeake & Potomac Telephone Co. v. United States, 654 F.2d 711 (Ct. Cl. 1981), and McDonald v. United States, 13 Cl. Ct. 255 (1987). The effect of accepting a check with a conditional endorsement is

governed by federal common law, not the Uniform Commercial Code. McDonald at 260. The McDonald court stated:

> "[I]n order to have an efficacious accord and satisfaction, both parties must agree that the payment ends a then-existing controversy. Otherwise, it is not enough for the debtor to simply write 'payment in full' on the face of his check and, self-servingly, legally attempt to extinguish the unpaid portions of his debt." Id. at 261 (emphasis in original).

Where the amount is in dispute and the debtor tenders payment of less than the amount claimed, along with a clear expression of intent that the tender is being offered in full settlement, acceptance of the payment will probably constitute an accord and satisfaction. Where the amount due is not in dispute, acceptance of payment in less than the amount of the debt will most likely not constitute an accord and satisfaction, regardless of the debtor's expressions of intent. McDonald, 13 Cl. Ct. at 261; Chesapeake & Potomac, 654 F.2d at 716; 40 Comp. Gen. 261, 268 (1960).

The message of all of this is that the agency must be extremely careful to avoid an unintended accord and satisfaction.

One final unreported case may merit brief mention. An individual named Linson took a student loan to go to law school and subsequently defaulted on the loan. The (then) Department of Health, Education, and Welfare purchased the defaulted loan and proceeded to pursue collection. Linson made several partial payments, writing on the back of each check the statement "Endorsement of this check acknowledges that the payor does not waive any defenses, including the statute of limitations, in regard to this alleged obligation." When the partial payments stopped, the government sued. Granting the government's motion for summary judgment, the court found that the endorsement did not express an intent that the check be considered full payment of the debt, and had "no legal significance" in the case. United States v. Linson, No. CV 83-0383-CHH (C.D. Cal. May 2, 1983).

d. Disposition of Amounts Collected

If an agency collects a debt, it must deposit the money in the Treasury as miscellaneous receipts unless the agency has statutory authority to credit the receipts to its own appropriations or the collection qualifies as a "repayment." This is nothing more than an application of 31 U.S.C. § 3302(b), discussed fully in Chapter 6.

Collections received after an account has been closed in accordance with 31 U.S.C. §§ 1552(a) or 1555 must be deposited as miscellaneous receipts,

notwithstanding that the agency could have retained the funds if collected prior to account closing. 31 U.S.C. § 1552(b).

Prior to 1990, GAO, when collecting debts referred to it by other agencies, had discretionary authority under 31 U.S.C. § 1552(b) to deposit the money as miscellaneous receipts, even where the referring agency could have retained the money if collected directly. Since 1963, it had been GAO's policy to deposit all such collections as miscellaneous receipts except collections involving trust or deposit fund accounts. B-138706, May 13, 1963 (circular letter); B-138706-O.M., October 1, 1963. Requests for exceptions were routinely denied. E.g., B-156343, January 17, 1966 (large amount); B-138706, November 30, 1965 (no-year account); B-156011, April 30, 1965 (revolving fund). In any event, when 31 U.S.C. § 1552 was amended in 1990, the provision in question was dropped. In view of the virtual phase-out of GAO's accounts receivable operation, the statutory change should not have significant impact.

e. Release

GAO has traditionally discouraged the use of a formal release to evidence the discharge of a debtor from liability. Where the debtor wants something, and it is clear that the amount to be paid will fully satisfy the government's claim, GAO has suggested the use of a conditional endorsement. B-158893, November 7, 1966.

There is, however, no prohibition on executing a release, and the government may do so if the debtor insists. The authority to execute a release is viewed as implicit in the authority to collect the claim. B-164535, June 25, 1968. The release may be signed by the official receiving the payment or any other responsible official of the creditor agency. Id.; 29 Comp. Gen. 59 (1941); B-160157, November 1, 1966.

D. Elements of a Debt Collection Program: Referrals to GAO and Justice Department

1. Referral to GAO

Prior to the 1984 revision of the Federal Claims Collection Standards, agencies were required to refer administratively uncollectible debts to GAO for further collection action. If GAO could not collect, compromise, or

terminate, it then referred the claim to the Justice Department for litigation. Even prior to the Federal Claims Collection Act of 1966, GAO had acted in this capacity under its general claims authorities. See, e.g., 16 Comp. Gen. 956 (1937). The original version of the Standards contained a provision, unchanged until the 1984 revision, instructing agencies to refer uncollectible claims to GAO unless GAO granted an exception, thereby permitting direct referral to the Justice Department. 31 Fed. Reg. 13384, October 15, 1966 (original 4 C.F.R. § 105.1). Thus, GAO's pre-1984 decisions and opinions contain frequent references to claims referred to GAO for further collection action.

GAO's efforts during this time period were reasonably successful. For example, in fiscal year 1979, GAO was able to collect $10.6 million in claims which had been referred to it as uncollectible.[50] However, weaknesses inherent in this system became increasingly apparent during the 1970s. GAO's authority to pursue further collection was limited to the same administrative devices that were available to the agency, things the agency had presumably already done or considered. Thus, having GAO as an intermediate step between the agency and the Justice Department was frequently unproductive. Also, the number of referrals grew to the point where GAO could not devote sufficient resources to handle them in a timely fashion.[51] In many cases, the automatic referral system ended up doing little more than using up more time for purposes of the statute of limitations.

GAO realized during this period that it could perform its role under the Federal Claims Collection Act more effectively by audit and oversight than by direct involvement in individual claims. As the first major step in reducing its "accounts receivable" activities, GAO began to liberally grant exceptions from the automatic referral requirement, doing so mostly on an agency-wide or program-wide basis. This approach produced significant results.[52]

The next major step came with the 1984 reissuance of the Federal Claims Collection Standards. The revised 4 C.F.R. § 105.1 eliminated the requirement for automatic referral of uncollectible debts to GAO. Thus,

[50]U.S. General Accounting Office, Annual Report 1979 at 37 (1980).

[51]For example, there were over 47,000 uncollectible debt referrals to GAO in fiscal year 1977. See GAO report Unresolved Issues Impede Federal Debt Collection Efforts—A Status Report, CD-80-1 (January 15, 1980), at 9.

[52]For FY 1980, referrals to GAO dropped to approximately 2,000 (CD-80-1, supra note 51, at 9), and collections dropped correspondingly to $4.7 million (GAO Annual Report for 1980, at 68).

most uncollectible debt claims can now go directly to the Justice Department.[53]

Apart from referrals for advice regarding a proposed compromise, suspension, or termination (4 C.F.R. §§ 103.8 and 104.4), the Standards currently provide for referral to GAO in only two instances:

- Claims arising from GAO audit exceptions. Id. § 105.1(b). These occur infrequently.
- Doubtful claims, i.e., cases in which the agency is unable to determine either the merits or the amount of the claim with reasonable certainty. Id. § 105.1(c); GAO Policy and Procedures Manual for Guidance of Federal Agencies, title 4, § 5.2.

Referrals to GAO under these provisions should use the same form, the Claims Collection Litigation Report, used to refer claims to the Department of Justice for litigation.

2. Referral to Justice Department

a. Basic Requirements

If an agency has taken the aggressive collection action prescribed in the Federal Claims Collection Act and Standards, is unable to compromise the claim, and if suspension, termination, or waiver is inappropriate, the debt is at that point considered to be "administratively uncollectible," and the next step is to sue the debtor. Administratively uncollectible debts must be referred to the Department of Justice for litigation unless the agency is authorized to handle its own litigation either by statute or by delegation from the Attorney General. 4 C.F.R. § 105.1(a).

If the gross original amount of the claim is $100,000 or less, the claim should be sent to the United States Attorney for the judicial district in which the debtor is located. If the gross original amount exceeds $100,000, the claim should be sent to the Commercial Litigation Branch of the Justice Department's Civil Division in Washington. Id. Claims of less than $600 should not be referred for litigation unless failure to do so would jeopardize a significant enforcement policy, or unless it is clear that the debtor has the ability to pay and the government can effectively enforce payment. Id. § 105.4.

[53]GAO had studied the matter a decade earlier and had concluded in an internal memorandum that there was no legal objection to discontinuing routine referrals. B-117604-O.M., January 12, 1973.

The debt should ordinarily be referred for litigation within one year of the agency's final determination of the existence and amount of the debt. 4 C.F.R. § 105.1(a). It is axiomatic that time favors the debtor. The longer the collection process drags out, the less likely collection becomes. In all cases, referral must be made prior to the earliest barring date under an applicable statute of limitations, even if this means cutting short the administrative collection process. Id.; 4 C.F.R. § 102.2(a). Claims may be referred after the barring date if there is some reasonable theory in support of a later date or if there is doubt as to the proper date. B-158275-O.M., July 5, 1974; B-158275-O.M., December 9, 1971. Referral of a time-barred claim is also appropriate if there is a possibility of using the debt as a counterclaim or offset in a pending suit against the government. 28 U.S.C. § 2415(f); B-169175.2, May 23, 1972 (non-decision letter).

There is a prescribed format for referring claims to the Justice Department for litigation. It is called the Claims Collection Litigation Report (CCLR). The CCLR is a form developed jointly by GAO and the Justice Department designed to provide Justice with all the information it will need to effectively litigate a debt claim. GAO transmitted the CCLR, with detailed instructions, to all executive agencies by circular letter dated January 20, 1983. Referrals to the Justice Department for litigation under 4 C.F.R. § 105.1 must use the CCLR unless Justice grants an exception. 4 C.F.R. § 105.2(a). Required information includes a brief summary of collection actions taken, the debtor's current address, and reasonably current credit data. Id. There is also a "short form" CCLR for use in referring claims of $5,000 or less.

The CCLR is also required when requesting the Justice Department's approval of a proposed compromise, suspension, or termination on a claim over $100,000. 4 C.F.R. § 105.2(b).

Obviously, the agency does not know at the outset of the collection process whether a referral to the Justice Department will be required. Nevertheless, it is clearly advantageous to use the CCLR as a "running record" of the agency's collection actions. This will greatly expedite and facilitate submission of the CCLR if and when needed.

The agency may, if it wishes, have the CCLR prepared by a debt collection contractor. The Federal Supply Schedule for debt collection services includes preparation of the CCLR when requested by the ordering agency. For further detail, see Adjunct Services Guidelines issued by the Treasury

Department's Financial Management Service in 1988 to supplement the Supply Schedule.

Once an agency has referred a claim to the Justice Department (or to GAO) under 4 C.F.R. § 105.1, it should not undertake any further collection actions. It is especially important that the agency promptly notify Justice (or GAO, as applicable) if it receives any further payments from the debtor.

b. Federal Debt Collection Procedures Act

The Department of Justice, upon receipt of a debt claim referred to it by another agency, has a wide range of authorities available to enforce collection. The statutory basis is the Federal Debt Collection Procedures Act of 1990, enacted as title XXXVI of the Crime Control Act of 1990, Pub. L. No. 101–647, 104 Stat. 4789, 4933 (1990), codified at 28 U.S.C. ch. 176.

Subchapter A, sections 3001–15, defines terms and sets forth some general provisions. The definition of "debt," 28 U.S.C. § 3002(3), is based in part on the detailed definition contained in the original Debt Collection Act of 1982 but is even more detailed. Under 28 U.S.C. § 3011, the government may, in certain cases, recover a 10 percent surcharge to cover the costs of litigation and enforcement.

Subchapter B, sections 3101–05, covers prejudgment remedies. Subject to notice and hearing requirements, these include obtaining a writ of attachment, establishing a receivership, garnishment of property (except earnings) in the possession or control of some third party, and sequestration of income.

Subchapter C, sections 3201–3206, addresses postjudgment remedies. One provision, 28 U.S.C. § 3201, provides for the creation of a judgment lien on real property, with a maximum duration of 40 years. A debtor subject to such a lien

> "shall not be eligible to receive any grant or loan which is made, insured, guaranteed, or financed directly or indirectly by the United States or to receive funds directly from the Federal Government in any program, except funds to which the debtor is entitled as beneficiary, until the judgment is paid in full or otherwise satisfied."

Id. § 3201(e). Program agencies may, by regulation, provide for waiver of this restriction. Id.

Subchapter D, sections 3301–3308, defines certain transfers of assets by debtors as fraudulent, and permits the government to avoid those transfers

or to proceed against the assets themselves or other property of the transferee.

c. Contracting for Legal Services

The Justice Department is the government's litigator (28 U.S.C. §§ 516–519). Therefore, individual agencies cannot litigate their own debt claims without either statutory authority or a delegation from the Attorney General. Also, the debt collection contracts authorized by 31 U.S.C. § 3718(a) cannot include legal services as this could constitute the unauthorized practice of law in many states. With increased emphasis on debt collection throughout the federal government, the resulting burden on the Justice Department should be apparent. As of September 30, 1985, the Justice Department was handling nearly 97,000 civil debt cases.[54] Despite the best efforts on everyone's part, this places Justice in an extremely difficult position in terms of allocating its own limited resources.

During the mid-1980s, Congress considered a number of bills to permit contracting with private counsel for legal services in the debt collection area. In commenting on several of these bills, GAO supported the concept, under proper supervision. See, for example, B-221099, February 18, 1986, outlining GAO's views as to what such legislation should contain. Use of private attorneys could have several advantages, such as increasing the government's yield on smaller claims which agencies would otherwise have to write off. E.g., B-212528, September 23, 1985.

The legislation was enacted in the form of Public Law 99–578, 100 Stat. 3305 (1986), codified at 31 U.S.C. §§ 3718(b) and (c). The law authorizes the Attorney General to contract with private counsel for legal services in debt collection cases, subject to the requirements for competition applicable to government procurement generally. Fees are to be based on fees typically charged private clients for similar services in the same geographical area.

As with the debt collection contracts authorized by 31 U.S.C. § 3718(a), the legal service contracts may be structured on a fixed-fee or contingent-fee basis, with fixed-fee contracts to be effective only to the extent provided in advance in appropriation acts. 31 U.S.C. §§ 3718(d) and (e).

The "first life" of Public Law 99–578 was to be a 3-year pilot program to be conducted in 5 to 10 judicial districts in accordance with the Attorney General's implementing regulations (28 C.F.R. Part 11). Pub. L. No. 99–578,

[54]GAO report, Justice Department: Impediments Faced in Litigating and Collecting Debts Owed the Government, GAO/GGD-87-7BR (October 1986), at 23.

§§ 3–5, 31 U.S.C. § 3718 note. The program was extended for another two years in 1990. Pub. L. No. 101–302, 104 Stat. 213, 216 (1990). It was later extended to September 30, 1996, and the number of judicial districts increased to 15. Pub. L. No. 102–589, § 4, 106 Stat. 5133, 5134 (1992).

GAO reviewed the initial phases of the program and issued a report entitled Department of Justice: Status of Implementing Private Attorney Debt Collection Pilot Program, GAO/GGD-89-90 (August 1989). GAO found that the requirements for competition had generally been followed and that the contract prices were reasonable. However, existing cost data did not permit a meaningful effectiveness comparison between the private attorneys and government attorneys. One district has reported extensive use of the authority in delinquent student loan cases. United States v. Spann, 797 F. Supp. 980, 983 (S.D. Fla. 1992).

d. Bidding In at Execution Sale

Obtaining a judgment against the debtor does not automatically put any money in the Treasury. If the debtor does not pay the judgment voluntarily, it may be necessary to execute the judgment against the debtor's property. When the government is executing against real property, 31 U.S.C. § 3715 authorizes the creditor agency to bid at the execution sale. It provides:

> "The head of an agency for whom a civil action is brought against a debtor of the United States Government may buy real property of the debtor at a sale on execution of the real property of the debtor resulting from the action. The head of the agency may not bid more for the property than the amount of the judgment for which the property is being sold, and costs. The marshal of the district in which the sale is held shall transfer the property to the Government."

This statute is not part of the Federal Claims Collection Act. It has been on the books since 1824 (4 Stat. 51). A 1965 report of the Senate Judiciary Committee revealed that it is used somewhat infrequently.[55] Nevertheless, "it could be useful in some cases in which forced sale values might not otherwise be expected to approximate fair market values." B-186813-O.M., October 14, 1976.

The 1982 recodification of Title 31 omitted one detail specified in the source statute—the explicit authority of the creditor agency to appoint an agent to bid at the sale, language the recodifiers thought "unnecessary."[56]

[55]Twenty-one cases for the period 1946–62, according to S. Rep. No. 234, 89th Cong., 1st Sess., reprinted in 1965 U.S. Code Cong. & Admin. News 1575, 1577.

[56]Compare 31 U.S.C. § 3715 (1988) with 31 U.S.C. § 195 (1976).

GAO, in its only relatively recent experience under this statute (B-186813-O.M., cited above), appointed the Assistant United States Attorney.

An agency may bid under 31 U.S.C. § 3715 even if it otherwise lacks authority to acquire real property. 34 Comp. Gen. 47, 50 (1954).

Real property acquired under 31 U.S.C. § 3715 is under the control of the General Services Administration. 40 U.S.C. § 301. If, subsequent to transfer of the property to the United States, the debtor pays the debt in full in money, the Administrator of GSA is authorized to reconvey the property to the debtor or the debtor's heirs or devisees. Id. § 306.

E. Government's Right of Setoff

1. Introduction

One of the more logical concepts in the law is setoff. Simply stated, if I owe you $100 and you owe me $50, I "set off" the $50 that you owe me against the $100 that I owe you, and my payment to you of $50 discharges both claims. The concept is "grounded on the absurdity of making A pay B when B owes A." Studley v. Boylston National Bank, 229 U.S. 523, 528 (1913). GAO has frequently stated the rule as follows, quoting from 1 Comp. Gen. 605, 606 (1922):

> "Every creditor has the right to apply the moneys of his debtor in his hands in the extinguishment of claims due him from the debtor."

The right of setoff derives from the common law. It does not require statutory authority, although as we will see, most applications in federal debt collection are now governed by statute. Of course, it is not available in any situation where it is expressly prohibited by statute.

The right of setoff available to the private creditor is equally available to the federal government. The most often-quoted statement of this principle, at least by GAO, is the following statement from United States v. Munsey Trust Co., 332 U.S. 234, 239 (1947):

"The government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.' [Citations omitted.]"

The government's right of setoff applies to debts arising from unrelated as well as related transactions, and to noncontractual as well as contractual debts. The right has been consistently recognized by the Supreme Court,[57] the Comptroller General,[58] and the Attorney General.[59]

GAO, in the performance of its claims settlement functions (e.g., claims referred to it under 4 C.F.R. § 105.1), may also exercise the government's right of setoff.[60] GAO's setoff authority prior to the Federal Claims Collection and Debt Collection Acts derived by necessary implication from 31 U.S.C. § 3702(a), GAO's basic claims settlement authority, in addition to the common law and GAO's other statutory authorities.[61]

There is no requirement that the government's claim be reduced to judgment before setoff may be used. An administrative determination of indebtedness is sufficient. E.g., United States v. American Surety Co., 158 F.2d 12 (5th Cir. 1946); 56 Comp. Gen. 264 (1977); 3 Comp. Gen. 1006, 1007 (1924); B-195126, January 17, 1980; B-162376, September 20, 1967; B-84150, October 22, 1951. A debtor who disputes an administrative setoff may seek judicial review.

As we noted earlier in this chapter, there is a technical distinction between "setoff" and "recoupment." For purposes of this discussion, we use "setoff" or "offset" to cover both situations. Another synonym for offset, found mostly in older cases involving military personnel, is "checkage."

Offsets can be categorized as either administrative or judicial. An administrative offset is one taken by an agency; a judicial offset is

[57]See, in addition to the Munsey Trust case cited in the text, Pearlman v. Reliance Ins. Co., 371 U.S. 132, 140 (1962); Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536 (1946), aff'g 59 F. Supp. 122 (Ct. Cl. 1945); Barry v. United States, 229 U.S. 47 (1913); McKnight v. United States, 98 U.S. 179 (1878), aff'g 13 Ct. Cl. 292 (1877); Gratiot v. United States, 40 U.S. (15 Pet.) 336 (1841).

[58]E.g., 14 Comp. Gen. 849 (1935); 6 Comp. Gen. 810 (1927); 3 Comp. Gen. 1006 (1924); B-152507, November 29, 1963; B-151895, August 9, 1963; B-146353, August 17, 1961; B-128358, July 9, 1956.

[59]E.g., 37 Op. Att'y Gen. 215, 216 (1933).

[60]E.g., United States v. Munsey Trust Co., 332 U.S. 234, 240 (1947); United States v. American Surety Co., 158 F.2d 12 (5th Cir. 1946); John P. Squire Co. v. United States, 30 F. Supp. 708 (Ct. Cl. 1940), cert. denied, 309 U.S. 689; Taggart v. United States, 17 Ct. Cl. 322 (1881); Bonnafon v. United States, 14 Ct. Cl. 484 (1878).

[61]E.g., 14 Comp. Gen. 849 (1935); 1 Comp. Gen. 605 (1922); B-143573, July 5, 1963.

accomplished by direction of a court. As we will set out in detail later, the Debt Collection Act of 1982 contained two offset provisions—section 5 dealing with offset against the salary of federal employees, and section 10 dealing with administrative offset generally. The terms "salary offset" and "administrative offset" have come to be associated with these two provisions. In addition, there is at the present time a proliferation of other statutes dealing with offset in various situations—several are cited in 64 Comp. Gen. 142, 144 n.2 (1984)—the result being that the topic has acquired an unfortunate degree of complexity. For purposes of establishing a basic conceptual framework, however, it should be kept in mind that all types of nonjudicial offset, including salary offset, are forms of "administrative offset" in the broader sense, the main difference being the different statutes and regulations applicable to the various types. See 64 Comp. Gen. at 144–47.

2. The Due Process Requirement

One of the fundamental underpinnings of American society is the constitutional rule that no person may be deprived of life, liberty, or property without "due process of law." The Fifth Amendment imposes this requirement on the federal government, the Fourteenth on the states.

Most offset opportunities will likely involve a property right protected under the Due Process Clause. For example, a person's entitlement to earned wages is a protected property right. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). So is the statutorily created interest in the continued receipt of Social Security disability benefits. Mathews v. Eldridge, 424 U.S. 319, 332 (1976). The interest of a retired federal employee in the receipt of his or her retirement benefits is similarly subject to due process. Wisdom v. Department of Housing and Urban Development, 713 F.2d 422 (8th Cir. 1983); Atwater v. Roudebush, 452 F. Supp. 622, 626–27 (N.D. Ill. 1976).

If due process applies, what kind of process, and how much of it, is due? The two essential elements of procedural due process are notice and an opportunity to be heard. Mullane v. Central Bank & Trust Co., 339 U.S. 306, 313 (1950). Note that we did not say "hearing." We said "opportunity to be heard." There is a big difference. Actually, the requirement is for an "opportunity for hearing appropriate to the nature of the case." Id.

The term "hearing" is often misunderstood. People tend to automatically equate the term with a full-blown, trial-type proceeding with lawyers, cross-examination, transcripts, etc. This, however, is not the case. The

Supreme Court has recognized that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the . . . proceedings." Boddie v. Connecticut, 401 U.S. 371, 378 (1971). A lower court has offered the following definition:

"A 'hearing' means any confrontation, oral or otherwise, between an affected individual and an agency decisionmaker sufficient to allow the individual to present his case in a meaningful manner. Hearings may take many forms, including a 'formal,' trial-type proceeding, an 'informal discuss[ion]' . . . or a 'paper hearing,' without any opportunity for oral exchange."

Gray Panthers v. Schweiker, 652 F.2d 146, 148 n.3 (D.C. Cir. 1981).

Thus, the first question in applying the due process hearing requirement is to determine whether some form of oral hearing is required. A case we have already cited several times in this chapter, Califano v. Yamasaki, 442 U.S. 682 (1979), provides guidance. The test is whether the type of determination involved is likely to involve issues of credibility or veracity. Such issues, the Court explained, cannot be fairly evaluated without personal contact between the person from whom collection is sought and the person deciding the case. Id. at 697. If such issues are usually involved, then an oral hearing is required. If not, then an oral hearing is not required, even though an occasional case of the type in question may raise such an issue. The Court stated:

"[W]e do not think that the rare instance in which a credibility dispute is relevant . . . is sufficient to require the Secretary to sift through all requests for reconsideration and grant [an oral] hearing to the few that involve credibility. . . . [S]ome leeway for practical administration must be allowed."

Id. at 696. The point to emphasize is that the test is applied by category, not by individual case.

If, under the Yamasaki test, an oral hearing is not required, due process is satisfied by a "paper hearing"—a review of the written record including, of course, any written submissions the debtor may wish to have considered.

Another case which is important in helping to make the oral vs. paper hearing determination is Mathews v. Eldridge, 424 U.S. 319 (1976), in which the Supreme Court held that constitutional due process does not

require an oral hearing prior to termination of Social Security disability insurance benefits. The Court summarized the relevant factors as follows:

> "[R]esolution of the issue whether . . . administrative procedures . . . are constitutionally sufficient requires analysis of the governmental and private interests that are affected. . . . More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Id. at 334–35. Applying this test, one court has held that a review of written submissions (paper hearing), with reasonable discovery, would satisfy constitutional due process in a dispute over the offset of overpayments by the Department of Housing and Urban Development under the Housing Act. Housing Authority of the County of King v. Pierce, 701 F. Supp. 844 (D.D.C. 1988), vacated in part, 711 F. Supp. 19 (D.D.C. 1989). (Both decisions must be read together.)

Even in those cases where an oral hearing is required, this still does not automatically mean a trial-type evidentiary hearing. The standard, as noted above, is a hearing "appropriate to the nature of the case." Thus, the form of oral hearings can range from a telephone conference to an informal face-to-face meeting to a trial-type hearing. Unfortunately, there is no simple formula for determining the appropriate level of formality. For further discussion, see Mathews v. Eldridge, in which the Court noted that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances" (424 U.S. at 348), and noted further that in only one case, Goldberg v. Kelly, 397 U.S. 254 (1970), involving the termination of welfare benefits, has the Court required a trial-type evidentiary hearing (424 U.S. at 333).

To sum up, a hearing may be either an oral hearing or a paper hearing. Yamasaki and Eldridge provide guidance in determining when an oral hearing is required. When an oral hearing is required, a careful study of Mathews v. Eldridge is a good starting point for determining the level of formality.

With respect to constitutional due process, two final points should be noted. First, due process rights may be waived. D.H. Overmyer Co. v. Frick

Co., 405 U.S. 174, 185–86 (1972); Boddie v. Connecticut, 401 U.S. 371, 378–79 (1971); 64 Comp. Gen. 493, 498–99 (1985). Second, due process must normally precede the deprivation of property, "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Boddie, 401 U.S. at 379. Post-deprivation hearings must be provided promptly. E.g., Bailey v. Secretary of Labor, 810 F. Supp. 261, 263 (D. Alaska 1993).

Prior to the 1984 revision of the Federal Claims Collection Standards, the Standards were largely silent on procedural protections. Since enactment of the Debt Collection Act in 1982 and the 1984 revision of the Standards, the applicable procedures for most administrative offsets are provided by statute or governmentwide regulation. It is nevertheless important to understand constitutional due process, for several reasons:

(1) The constitutional requirement, as interpreted by the Supreme Court, forms the basis against which statutory or regulatory procedures will be measured. (The constitutional standard is the minimum. Congress may—and has done so in certain instances—provide procedural protections by statute beyond what the Constitution would otherwise require.)

(2) Although many offset statutes do not specify procedural protections, a fair reading of judicial precedent compels the conclusion that some will be required. As the Comptroller General has stated, "the question would seem to be not whether procedural protections are required, but what form they should take." 64 Comp. Gen. 142, 148 (1984). This would seem equally true under the common law. E.g., Housing Authority of the County of King v. Pierce, 701 F. Supp. 844 (D.D.C. 1988), vacated in part on other grounds, 711 F. Supp. 19 (D.D.C. 1989).

(3) The procedures provided in the Federal Claims Collection Standards are based heavily on the Supreme Court's decisions, and are designed to satisfy constitutional due process as the Court has thus far interpreted it.

3. Administrative Offset

a. Law Prior to the Debt Collection Act

As noted earlier, the federal government has long asserted its right under the common law to collect debts by means of administrative offset, and the courts, including the Supreme Court, have recognized and upheld this right.

In 1966, Congress enacted the Federal Claims Collection Act which gave agencies an affirmative duty to pursue collection action and authorized issuance of the Federal Claims Collection Standards. While the Federal Claims Collection Act did not specifically mention offset, the Standards since their inception included a provision instructing agencies to use administrative offset whenever feasible. See 31 Fed. Reg. 13381, 13382 (1966) (original 4 C.F.R. § 102.3).

Thus, it has been suggested that, since 1966, administrative offset has had somewhat of a statutory basis, albeit not an explicit one, and was no longer purely a common-law offset. See Louisiana v. Bergland, 531 F. Supp. 118, 122 (M.D. La. 1982), aff'd sub nom. Louisiana v. Block, 694 F.2d 430, 432 n.4 (5th Cir. 1982).

b. 31 U.S.C. § 3716

With the enactment of section 10 of the Debt Collection Act of 1982, codified at 31 U.S.C. §§ 3701(a)(1) and 3716, Congress provided an explicit governmentwide statutory basis for administrative offset. The corresponding provision of the Federal Claims Collection Standards is 4 C.F.R. § 102.3.

The statute defines "administrative offset" as "withholding money payable by the United States Government to, or held by the Government for, a person to satisfy a debt the person owes the Government." 31 U.S.C. § 3701(a)(1). The basic authority for administrative offset is found in 31 U.S.C. § 3716(a):

"After trying to collect a claim from a person under section 3711(a) of this title, the head of an executive or legislative agency may collect the claim by administrative offset."

This does not require the agency to attempt the full range of administrative collection actions, but it does mean that offset cannot be the sole first step. As noted in our discussion of demand letters, an offset opportunity justifies deviation from the normal demand cycle. The agency's first letter to the debtor can combine demand for payment with notification of intent to collect by offset, but it must give the debtor the opportunity to avoid the offset by making voluntary payment. 4 C.F.R. § 102.2(e).

The Standards contain the following general prescription:

"Collection by administrative offset will be undertaken in accordance with these standards and implementing regulations established by each agency on all claims which are

liquidated or certain in amount in every instance in which such collection is determined to be feasible and not otherwise prohibited." 4 C.F.R. § 102.3(a).

The phrase "liquidated or certain in amount" is merely an incorporation of the limitation applicable to setoff generally. E.g., 56 Comp. Gen. 279, 288 (1977). The regulations do not further define it, but it has been held not to preclude setoff merely because the claim is disputed or the dispute has not yet been finally resolved. E.g., B-193432/B-211194, January 5, 1984. It also does not preclude setoff of an estimated amount. See B-187178, October 7, 1976. However, under certain circumstances, a claim whose amount is derived from statistical sampling may not be sufficiently "liquidated or certain in amount" to support offset under 4 C.F.R. § 102.3(a). 56 Comp. Gen. 963 (1977). See also B-210600, September 18, 1984 (claim against airline calculated from experience of other airlines too conjectural for offset purposes).

Section 102.3(a)(2) discusses when offset is "feasible." Offset is not mandatory in every case in which there is an available source of funds. Rather, the determination is "to be made by the creditor agency on a case-by-case basis, in the exercise of sound discretion." Id. The agency should weigh all relevant factors, including the debtor's financial condition and the extent to which offset might thwart the purposes of the program against whose funds the offset is contemplated. Id. As one court put it, section 102.3(a)(2) "makes explicit the non-mandatory nature of the offset authority and the considerations involved in its exercise." American Bankers Association v. Bennett, 618 F. Supp. 1528, 1531 (D.D.C. 1985), vacated on other grounds, 802 F.2d 1483 (D.C. Cir. 1986). The standard of feasibility had always been viewed as incorporating the exercise of discretion. E.g., B-167635, November 18, 1975. The detail which is now in section 102.3(a)(2) was taken largely from 62 Comp. Gen. 599 (1983). The regulation does not specify cost effectiveness as one of the factors in the equation. However, as the 1984 preamble notes, "the concept of feasibility is sufficiently broad so as to encompass cost effectiveness in appropriate situations." 49 Fed. Reg. at 8890.

Agencies are required to issue regulations on administrative offset. 31 U.S.C. § 3716(b); 4 C.F.R. § 102.3(b)(1). An agency attempting an administrative offset without regulations risks having the offset invalidated, although the subsequent issuance and application of regulations which satisfy all requirements have been found to cure violations. Allison v. Madigan, 951 F.2d 869 (8th Cir. 1991); Moseanko v. Yeutter, 944 F.2d 418 (8th Cir. 1991). One thing an agency may do in its regulations is flesh out the definition of

"person" against whose assets offset may be taken. McCall Stock Farms, Inc. v. United States, 14 F.3d 1562 (Fed. Cir. 1993) (upholding an application of the "alter ego" doctrine).

Section 3716(a) gives the debtor certain procedural rights. The agency must give the debtor written notice of the nature and amount of the debt, the agency's intent to collect by offset, and an explanation of the following rights:

- Opportunity for review within the agency of the agency's determination as to the existence and amount of the debt;
- Opportunity to inspect and copy agency records relating to the debt; and
- Opportunity to enter into a written repayment agreement.[62]

The Federal Claims Collection Standards, specifically 4 C.F.R. § 102.3(c), prescribe when "review within the agency" must take the form of an oral hearing, and when a "paper hearing" will suffice. The objective, as explained in the preamble to the 1984 revision of the Standards, is to assure compliance with constitutional due process as well as the statute itself. 49 Fed. Reg. at 8891. To do this, the Standards use the Supreme Court's Yamasaki test described previously, under which the type of hearing depends on whether issues of credibility or veracity are involved. If an oral hearing is required under section 102.3(c), it does not have to be a formal, trial-type evidentiary hearing unless otherwise required by law. 4 C.F.R. § 102.3(c)(1).

How should an agency evaluate a debtor's offer to enter into a repayment agreement? The determination is largely discretionary, although the Standards provide some guidance:

"The determination should balance the Government's interest in collecting the debt against fairness to the debtor. If the debt is delinquent and the debtor has not disputed its existence or amount, an agency should accept a repayment agreement in lieu of offset only if the debtor is able to establish that offset would result in undue financial hardship or would be against equity and good conscience." 4 C.F.R. § 102.3(b)(2)(i).

"An agency," added the 1984 preamble, "is not required to accept an unreasonable proposal." 49 Fed. Reg. at 8891.

[62]This is an example of Congress going beyond the constitutionally required minimum. Constitutional due process does not include the right to negotiate a repayment agreement. Wisdom v. Department of Housing and Urban Development, 713 F.2d 422, 425 (8th Cir. 1983).

In our previous capsule summary of constitutional due process, we noted that the government can seize first and give the hearing later if warranted by a sufficient governmental interest. The Standards incorporate this point in 4 C.F.R. § 102.3(b)(5), which permits taking the offset prior to completion of the required procedures if necessary to protect the government's ability to collect the debt. The preamble emphasizes that this permits deviation from the time sequence, not elimination of the procedures. 49 Fed. Reg. at 8891. An agency availing itself of this deviation must provide the appropriate procedures promptly after the offset. B-246307.2, August 5, 1992.

As with constitutional due process, rights under 31 U.S.C. § 3716 may be waived as long as the waiver is voluntarily, knowingly, and intelligently made. Similarly, the parties may contractually agree to different procedures, in which event the agreement takes precedence. 64 Comp. Gen. 493, 498 (1985).

An agency is not required to duplicate procedures already provided under some other authority. 4 C.F.R. § 102.3(b)(2)(ii). The debtor may be entitled to due process, but is not entitled to get it twice on the same debt.

If a creditor agency is seeking to offset against a payment to be made by another agency, it is the creditor agency's responsibility to provide the required procedures. In its request for offset, the creditor agency must certify in writing that it has complied with section 102.3. 4 C.F.R. § 102.3(f). The agency receiving the request is expected to cooperate. Id. § 102.3(d). It is not the receiving agency's responsibility to look behind a compliance certification that is sufficient on its face. Agency offset regulations should address both ends of this situation—making offset requests to other agencies and processing requests received from other agencies. Id. § 102.3(b)(2). "[A]ppropriate regulations are necessary for agencies at both ends of the offsetting process." American Bankers Association v. Bennett, 618 F. Supp. at 1532.

How is an agency to know if it is about to make a payment to someone who is indebted to another agency? There is, as of the date of this publication, no centralized data bank of persons or organizations indebted to the government. Some favor such a concept because it would greatly facilitate collection. Others, invoking undesirable Orwellian imagery, oppose it. Whatever one's views on this question, the fact is that a centralized governmentwide data base for debt collection purposes does not exist.

There is only a partial and limited solution, based on probabilities and common sense. It is clearly not feasible for an agency to check with every other federal agency before making a payment. A selective check, however, may be useful in appropriate cases. For example, an agency making payment to a group of individuals might check with the Department of Education for delinquent student loans. If farmers are involved, the Agricultural Stabilization and Conservation Service (ASCS), Department of Agriculture, may be able to help. The ASCS maintains a listing at the county level of persons indebted under ASCS programs. This is called the Federal Debt Register or Claims Control Record.[63] In addition, the ASCS will cooperate in offsetting debts owed by ASCS program participants to other agencies. 7 C.F.R. § 13.6. For contract debts, a useful device is the Army Holdup List, described later.

An agency may not use administrative offset under 31 U.S.C. § 3716 to collect a debt which has been outstanding for more than 10 years. Id. § 3716(c)(1); 4 C.F.R. § 102.3(b)(3).

Under the definition of administrative offset noted earlier, any money payable to the debtor, or held by the government for the debtor, is "fair game" for offset unless prohibited by some other law. This would include a Treasury check drawn payable to the debtor and deposited with the clerk of a court pending disposition at the court's order. The funds evidenced by the check are considered sufficiently within the possession and control of the United States for offset purposes. United States v. Trinity Universal Insurance Co., 249 F.2d 350 (5th Cir. 1957). (While this case predates the Federal Claims Collection and Debt Collection Acts, the point would appear equally valid under 31 U.S.C. § 3716.)

c. Contract Debts

(1) Right of setoff generally [64]

In our discussion of the common-law foundation of federal debt collection, we noted the fundamental principle of United States v. Wurts that the government has the inherent right, independent of statute, to collect debts owed to it. This right applies with full force to contract claims. Consortium

[63]One court has overbroadly described this as a listing of "all those whom the government reasonably believes owes it money." United States v. Medlin, 767 F.2d 1104, 1106 (5th Cir. 1985).

[64]Section 6(a) of the Contract Disputes Act of 1978, 41 U.S.C. § 605(a), provides that "[a]ll claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer." While a contracting officer or agency head is still free to seek GAO's advice, appeals from the contracting officer's decision go to a board of contract appeals or directly to court. Thus, the boards of contract appeals now constitute the primary source of administrative case law in this area, with GAO's involvement correspondingly decreasing.

Venture Corp. v. United States, 5 Cl. Ct. 47 (1984); Burnett Electronics Laboratory, Inc., ASBCA No. 23938, 80-2 BCA ¶ 14,619 (1980); Foreman Industries, Inc., ASBCA No. 23948, 80-2 BCA ¶ 14,501 (1980).

Contract debts arise in many ways. The Federal Acquisition Regulation, at 48 C.F.R. § 32.602, gives several examples, a few of which are:

- Damages or excess costs resulting from default in performance.
- Government expense of correcting defects.
- Overpayments resulting from errors in quantity or billing.
- Retroactive price reductions resulting from price redetermination clauses.

Because a contractor is more likely to have an ongoing, or at least recurring, relationship with the government, and because of the nature of contract financing, offset opportunities tend to be more common in the context of contract claims. Administrative offset has traditionally been a pivotal means of collecting contract debts, and the government's right to use it has been recognized in a wide variety of situations.

As a general proposition, if a contractor is indebted to the government, the government may set off the indebtedness against contract payments. E.g., Madden v. United States, 371 F.2d 469 (Ct. Cl. 1967); Tatelbaum v. United States, 10 Cl. Ct. 207, 210 (1986); 62 Comp. Gen. 337 (1983); 28 Comp. Gen. 543 (1949); 4 Comp. Gen. 177 (1924).

The debt and payment may be attributable to the same transaction or contract. For example, the Navy could set off against the final contract payment the cost of work remaining to be performed under a warranty clause. B-187178, October 7, 1976. Similarly, the Air Force could set off, for payment to the Internal Revenue Service, underpayments of the contractor's share of Federal Insurance Contribution Act (Social Security) payments. B-196064, November 18, 1980. Setoff under a Bonneville Power Administration contract was appropriate in B-188473, August 3, 1977, to reimburse the Forest Service, pursuant to a clause in the contract, for firefighting costs the Forest Service incurred suppressing a fire caused by the contractor's operations.

The debt may also result from a separate and independent transaction. Thus, indebtedness under one contract may be set off against payments due under another contract. 2 Comp. Gen. 479 (1923); B-176791, September 8, 1972; B-168619, January 14, 1970; 4-J Sales & Service, DOT

BCA No. 1904, 89-1 BCA ¶ 21,209 (1988). As the Supreme Court said in Barry v. United States, 229 U.S. 47, 53 (1913):

"It would be folly to require the Government to pay under the one contract what it must eventually recover for a breach of the other."

The indebtedness to be offset need not be contractual. For example, in B-184506, October 29, 1975, GAO found setoff against contract payments a proper means to collect improperly refunded license fees.

If the amount of the government's claim has not yet been finalized, the government may set off a reasonable estimate. E.g., B-187178, October 7, 1976; B-176791, September 8, 1972. The setoff of an estimate is authorized notwithstanding the absence of a final resolution of a contract dispute (administrative or judicial) underlying the debt. B-188473, August 3, 1977; B-178368, September 24, 1973; B-163625, March 14, 1968.[65] Although the government may base its setoff on an estimate, it may not base its estimate on statistical sampling. 56 Comp. Gen. 963 (1977).

Where a new corporation is in essence a mere continuation of an old (debtor) corporation, debts of the old corporation may be set off against contract payments to the new corporation. The new corporation seeking to avoid liability has the burden of establishing that it is not a mere continuation. B-212991, November 28, 1983; B-191129, September 8, 1978. However, the fact that two corporations were organized by the same officers and shareholders and that one is carrying on the business of the other with the same assets and personnel, while raising a strong presumption, does not automatically establish liability. Thus, setoff against a "buyer" corporation meeting these tests was held improper where the "buyer" had been in existence for several years prior to acquisition, the debtor remained in corporate existence, and the transfer was supported by a fair cash consideration. B-193966, April 12, 1979. The same concepts apply to two co-existent corporations. A creditor agency may "pierce the corporate veil" if it has sufficient factual basis to conclude that the two are essentially different names for the same entity, and the corporation adversely affected then has the burden of showing that the agency is wrong. B-230158.2, March 1, 1991.

The concept of "piercing the corporate veil" usually involves finding individuals liable for debts incurred by a corporation. A case involving a

[65]This is not really a setoff. It is more akin to a preliminary withholding pending completion of the dispute resolution, which the government is entitled to do. E.g., Cord Moving & Storage Co. v. United States, 17 Cl. Ct. 741, 743 (1989).

"reverse pierce" is McCall Stock Farms, Inc. v. United States, 14 F.3d 1562 (Fed. Cir. 1993), upholding an offset against a corporation for a debt incurred by its principals as individuals.

A corporation is not liable for debts incurred by one of its officers in his or her individual capacity after leaving the corporation. Thus, contract payments to a corporation could not be used to set off debts the former president of the corporation incurred under government contracts he had entered into as an individual after leaving the corporation. 56 Comp. Gen. 499 (1977).

With respect to a partnership or joint venture, the general rule is that a payment to the partnership or joint venture may not be used to offset the prior, independent indebtedness of an individual partner or co-venturer. 48 Comp. Gen. 365 (1968); 39 Comp. Gen. 438 (1959). However, if there is an agreement by all parties to the contract that the individual's liability will be borne by partnership or joint venture assets, the rule does not apply. 48 Comp. Gen. at 368.

The government's right of setoff applies to debts owed to the Small Business Administration by a "section 8(a)" subcontractor. B-189183, January 12, 1979; B-177648, August 10, 1973, aff'd upon reconsideration, B-177648, December 14, 1973.

In 46 Comp. Gen. 178 (1966), the Comptroller General held that moneys withheld from a contractor under the Davis-Bacon Act were available for setoff of government claims against the contractor, at least before the contracting agency transferred the funds to GAO. The Comptroller General modified this decision in 55 Comp. Gen. 744 (1976), holding that the claims of underpaid workers have priority over an IRS tax levy to withheld Davis-Bacon funds.

However, funds withheld under the Davis-Bacon Act are not available to pay the claims of underpaid laborers arising from the performance of a different contract by the same contractor. B-189535, August 9, 1977; B-187142, December 28, 1976; B-187761-O.M., April 15, 1977. GAO has applied the same principle to the Contract Work Hours and Safety Standards Act. 48 Comp. Gen. 387 (1968); B-187142, December 28, 1976; B-170784, February 17, 1971.

Debts resulting from violations of the Walsh-Healey Act, 41 U.S.C. §§ 35–45, may be collected by withholding from "any amounts due on any

such contracts." 41 U.S.C. § 36. This provision has been construed to permit offset against other contracts subject to the Walsh-Healey Act, whether or not there were violations under those other contracts, but not against contracts not subject to the Walsh-Healey Act. Unexcelled Chemical Corp. v. United States, 149 F. Supp. 383 (Ct. Cl. 1957); Ready-Mix Concrete Co. v. United States, 130 F. Supp. 390 (Ct. Cl. 1955); B-144604(1), December 18, 1961.

A claim for excess costs under one contract may be set off against the balance due under another contract with the same contracting agency, and a tax claim is subordinate to the excess cost claim. B-189902, October 5, 1977.

Setoff issues frequently arise in cases involving competing claims to unpaid contract balances. The claimants may include assignees under the Assignment of Claims Act, Miller Act performance and payment bond sureties, the Internal Revenue Service, and other government agencies. These cases are discussed in Chapter 12 under the headings "Contract Financing: The Assignment of Contract Payments" and "Priority to Contract Balances."

The government is under no obligation to exercise the right of setoff against money due a contractor on unrelated contracts for the benefit of a surety, for example, for the purpose of holding a surety harmless on a defaulted contract. B-160641, April 28, 1967.

An award by a board of contract appeals is subject to setoff just like any other contract payment. When a monetary board award is submitted to GAO for payment from the permanent judgment appropriation (31 U.S.C. § 1304), GAO uses the procedures prescribed by 31 U.S.C. § 3728 for setoff against court judgments.

A different type of contract setoff question arose in B-186852, October 21, 1976. The General Services Administration was selling excess zinc and inadvertently overstated the remaining undelivered quantity. Based on GSA's error, the purchaser overpaid the purchase price. The Comptroller General held that GSA could retain the overpayment to set off a prior unrelated debt of the purchaser.

(2) Repayment bond in lieu of setoff

Prior to the Federal Claims Collection Act of 1966, GAO had held that there was no authority to accept a repayment bond in lieu of setoff. The reasons were set forth in B-71886, January 28, 1948, as follows:

"[T]here is no express provision of law authorizing this Office to accept a bond of indemnity as security for the payment of such an account. The practical effect of the action urged by you would be to deprive the United States of the use of the amount involved for an indefinite period of time, in order to confer an equal benefit upon the company, which company would be permitted to substitute for its obligation a bond upon which the United States well might be required to initiate legal proceedings. Manifestly, such action would be contrary to the interests of the United States. The hardship, if there be any, may not be assumed by the Government but must rest where it falls. Moreover, the offset of amounts due the company obviously is best fitted to protect the United States, especially in cases of disputed liability."

Under the Federal Claims Collection Act and Standards, as noted earlier, an agency has authority to determine whether collection by offset is feasible in a particular instance. Therefore, the agency has discretionary authority to accept a repayment bond if it determines that offset is not feasible. B-167635, November 18, 1975. The factors noted in the 1948 decision are, of course, relevant in making this determination, keeping in mind that an officer of the United States is expected to protect the interests of the United States. The device should therefore be used sparingly.

(3) Setoff against security deposit

As a general proposition, a security deposit being held by the government should not be used to offset a debt which arose under a separate contract, unless authorized by the solicitation or contract under which the deposit was given. The cases generally involve contracts for the sale of government property (timber sales, surplus property sales, etc.), and range from deposits by unsuccessful bidders to default situations to disposition upon contract completion.

A key decision is 33 Comp. Gen. 262 (1953). A contractor had obtained an excessive weight permit to transport logs from a national forest, and refused to pay the permit fee. The National Park Service held two separate sums of money against which it wanted to offset the debt owed under the permit—a cash bond the contractor had deposited to insure compliance with the permit, and a cash bond submitted under a separate logging

contract which had been completed. The Comptroller General concluded that the cash bond given in connection with the permit could be retained as an offset, but that the bond given under the separate contract should be returned to the contractor. "The general rule of law is that a pledge to secure a specific debt or obligation may not be held by the pledgee as security for any other obligation, and a refusal to return the pledge after the obligation it secures has been performed [is improper]." Id. at 263.

A few years later, the 1953 decision was overruled by 38 Comp. Gen. 476 (1959), based essentially on the "bird in the hand" theory. However, a 1961 decision, 41 Comp. Gen. 86, concluded that 38 Comp. Gen. 476 had been ill-advised and overruled it, effectively reinstating 33 Comp. Gen. 262. A decision similar to 33 Comp. Gen. 262 is B-150897, May 6, 1963.

GAO reviewed the earlier cases in 45 Comp. Gen. 504 (1966), another case involving timber sale contracts, and summarized the state of the law as follows:

> "In view of the various reasons for requiring these deposits, or payments, and the numerous clauses governing the disposition of their unused portions, we are unable to give categorical answers . . . . Each case must be considered on its own merits in light of the existing circumstances. We can only state generally that where an amount is required in lieu of a security bond or is intended to secure one or more particular obligations, that amount may not be retained after full performance of the secured obligations; however, where an amount is intended to apply on the contract price, and is not otherwise restricted, any residual amount may be retained for extinguishment of other obligations of the party." Id. at 505–06.

Offset of a security deposit to satisfy prior indebtedness is permissible to the extent authorized under the terms of the contract. Id. at 506; B-169731, June 29, 1970.

As some of the decisions indicate, offset is less of a problem where the debt arises under the same contract. In B-154380, June 24, 1964, the Forest Service incurred costs in suppressing a fire caused by the contractor's use of explosives in disregard of contract provisions. The contract provided that the purchaser would bear the costs of suppressing negligently caused fires, but was silent as to the disposition of deposit balances. The decision concurred with the Forest Service's proposal to offset its claim against the deposit balance.

While a security deposit under one contract cannot be used to offset a debt under another contract unless the contract so provides, the deposit has been held available to satisfy a tax levy issued by the Internal Revenue Service. B-156868, July 19, 1965.

In the cases discussed thus far, the contract under which the deposit had been made was either completed or defaulted. Another group of cases involves bid deposits by unsuccessful bidders. Two early decisions held that the deposits could be used to offset debts arising under other contracts.[66] While these decisions have not been expressly overruled or modified, the position of the more recent cases is that bid deposits submitted by unsuccessful bidders may not be used to offset prior claims unless so provided in the solicitation. B-160149(2), December 29, 1966. See also B-153100, October 27, 1965; B-147004, September 11, 1961.

One clever bidder tried to avoid the offset exposure by writing on the back of his deposit check that the check would be dishonored unless an award and contract resulted from the bid. Good try, but it didn't work. The bid was rejected as nonresponsive. 47 Comp. Gen. 401 (1968).

To sum up, a bid deposit by an unsuccessful bidder may not be retained to offset prior claims unless provided in the solicitation. Where there is an actual contract, whether completed or defaulted, a security deposit may be used to offset claims arising under the same contract unless otherwise restricted, but may not be used to offset debts under other contracts unless expressly provided. The terms of the contract or solicitation under which the deposit is provided will be the controlling factor.

(4) The Army Holdup List

A highly useful aid in offsetting contract debts is the "List of Contractors Indebted to the United States," more commonly known as the "Army Holdup List," published by the Defense Finance and Accounting Service (DFAS), Indianapolis Center.[67] It is revised and reissued semi-quarterly and distributed to federal agencies on DFAS' mailing list. To hold down costs for DFAS, agencies should request only those copies that are absolutely necessary, locally reproducing whatever else they may need.

[66]17 Comp. Gen. 923 (1938); 14 Comp. Gen. 430 (1934).

[67]Prior to the 1991 reorganization which created DFAS, the Indianapolis Center was for a very long time the Army Finance and Accounting Center, hence the informal designation.

Use of the Army Holdup List is encouraged. 4 C.F.R. § 102.3(d). Procedures and instructions are found on the list itself and in Title 4 of GAO's Policy and Procedures Manual for Guidance of Federal Agencies.

Contract debts of $200 or more may be reported to DFAS for inclusion on the list. The information will thus be available to other federal agencies for offset purposes. A case in which the Holdup List was successfully used is 4-J Sales & Service, DOT BCA No. 1904, 89-1 BCA ¶ 21,209 (1988). It is the responsibility of the creditor agency to report any changes, corrections, or deletions.

Any administrative procedures required in establishing the debt should be completed by the creditor agency prior to reporting the debt to DFAS, and the report should so state.

While the Army Holdup List is designed primarily for contract debts, noncontractual debts may be reported as well. B-184506, October 29, 1975 (claim for return of refunded license fee). However, debts of individuals who have no contracts with the government should not be reported.

(5) Debt Collection Act vs. Contract Disputes Act

The preceding sections, for the most part, have discussed the government's basic right to use offset to collect contract debts. They have not addressed what procedures must be followed.

Until the 1980s, it was fairly well settled that the Federal Claims Collection Act and Standards applied to government claims arising from procurement contracts. For example, in Commercial Building Maintenance Service, DOT CAB Nos. 72-14, 72-15, 72-2 BCA ¶ 9527 (1972), the Federal Aviation Administration had asserted a claim for excess reprocurement costs against a defaulted contractor, and the only issue was the contractor's assertion of financial inability to pay. The board held that there was nothing for it to resolve, and remanded the case to the contracting officer for appropriate action under the Federal Claims Collection Act and Standards.

The Contract Disputes Act of 1978 established new procedures for the adjudication of claims by and against the government relating to procurement contracts. The Contract Disputes Act does not address collection techniques and, by itself, had little impact on debt collection

apart from designating the contracting officer and the boards of contract appeals as the appropriate tribunals for adjudicating contract claims.

With the enactment of the Debt Collection Act of 1982, primarily 31 U.S.C. § 3716, what had been a simple matter became controversial. Questions soon arose over the extent to which the Debt Collection Act applied to procurement contracts. The heart of the issue seems to be the procedural requirements of section 3716 and whether they mandate another layer of procedures over and above the Contract Disputes Act. Nothing in the Debt Collection Act itself or its legislative history addresses the question.

While GAO never had the occasion to address this issue in a formal decision, GAO saw no conflict between the two statutes.[68] The Contract Disputes Act tells you how to determine the existence and amount of a government claim. The Federal Claims Collection Act and Standards tell you how to go about collecting it. In addition, the Federal Claims Collection Standards—specifically 4 C.F.R. §§ 101.7 and 102.3(b)(2)(ii)—make it clear that the government is not required to provide duplicate procedures on the same debt. Under this approach, if the existence and amount of the debt have been determined under Contract Disputes Act procedures, which would presumably include reasonable discovery, there should be no need to duplicate these procedures for purposes of 31 U.S.C. § 3716 in those cases where it is deemed to apply. Compliance with the Contract Disputes Act certainly provides adequate "due process." See, e.g., 4-J Sales & Service, DOT BCA No. 1904, 89-1 BCA ¶ 21,209 at 107,011, in which the board noted:

"Contrary to its allegations, 4-J has not been deprived of due process. The requirements of due process were satisfied by the Contract Disputes Act having afforded 4-J the opportunity to contest the two Army contracting officer decisions. Having failed to exercise the rights given by the Act, 4-J cannot now be heard to allege that it has been deprived of due process."

Be that as it may, others did perceive a conflict, and a minor flood of litigation ensued. The first wave of cases generally found 31 U.S.C. § 3716 inapplicable where the amount due the government and the payment against which it is to be offset arise under the same contract. This was the result in the following cases:

[68]See B-222029, February 13, 1986 (internal comments on proposed legislation); letter dated November 13, 1987, no file designation, from GAO Associate General Counsel to Administrative Conference of the United States (comments on draft ACUS recommendation) (copy on file with editors). A private commentary which also saw no conflict is Debt Collection by Offset: What's Wrong?, 1 Nash & Cibinic Report ¶ 5 (January 1987).

- Reduction in contract price under Defective Cost or Pricing Data clause. Fairchild Republic Co., ASBCA No. 29385, 85-2 BCA ¶ 18,047 (1985), aff'd on reconsideration, 86-1 BCA ¶ 18,608 (1985), dismissed for lack of jurisdiction, Fairchild Republic Co. v. United States, 810 F.2d 1123 (Fed. Cir. 1987).
- Reduction in contract price pursuant to Changes clause. A. J. Fowler Corp., ASBCA No. 28965, 86-2 BCA ¶ 18,970 (1986); Atlantic States Construction, Inc., ASBCA No. 27681, 85-3 BCA ¶ 18,501 (1985).
- Liquidated damages in form of contract price reduction for degradation in performance. Information Consultants, Inc., GSBCA Nos. 8130-COM, 8528-COM, 86-3 BCA ¶ 19,198 (1986).
- Liquidated damages for delay in completion of work. Rivera Construction Co., ASBCA Nos. 29391, 30207, 88-2 BCA ¶ 20,750 (1988).

These decisions seem to view the withholdings in question as contract price adjustments pursuant to various contract clauses rather than administrative offsets within the scope of section 3716. They further appear to draw a distinction between situations in which the government is trying to recoup a payment previously made and situations in which the price adjustment is to be offset against payments not yet made, finding section 3716 inapplicable in the latter situation. Fairchild, 85-2 BCA at 90,600; A. J. Fowler, 86-2 BCA at 95,794; Information Consultants, 86-3 BCA at 97,101; Rivera, 88-2 BCA at 104,858. Cf. 62 Comp. Gen. 337 (1983), in which a contract with an illegal cost-plus-percentage-of-cost clause was to be modified by substituting a fixed fee, with GAO suggesting that any overpayments under the illegal clause be "recaptured" during the fixed-fee negotiations.

In Avco Corp. v. United States, 10 Cl. Ct. 665 (1986), the Air Force withheld progress payments from Avco because of alleged performance deficiencies. Avco argued that failure to comply with 31 U.S.C. § 3716 invalidated the offsets. The government argued that section 3716 did not apply. Noting that the question of whether section 3716 applies to contracts governed by the Contract Disputes Act was a question of first impression in the courts, the Claims Court found it unnecessary to address the broader issue, holding instead as follows:

"The kind of debts targeted by the Debt Collection Act are not intra-contractual disputes like ours. . . . Invoking the Debt Collection Act in this type of case would add a new procedural matrix to every contract. Absent explicit statutory authorization, the court will not infer so significant an expansion of procedural requirements in contract administration. . . . Therefore, pretermitting the question of whether the Debt Collection Act applies to

government contracts generally, the court concludes it does not apply when payment is withheld because of disputes over performance of a contract." 10 Cl. Ct. at 667–68.

In one pre-Avco case, a board had held the Debt Collection Act applicable where the agency had tried to recover an erroneous overpayment by offset against an unrelated fund under the same contract. Pat's Janitorial Service, Inc., ASBCA No. 29129, 84-3 BCA ¶ 17,549 (1984). Post-Avco cases holding that section 3716 does not apply to the recovery of overpayments by offset against future payments due under the same contract include Flag Real Estate, Inc., HUD BCA No. 84-899-C14, 88-3 BCA ¶ 20,866 (1988), and Snowbird Industries, Inc., ASBCA No. 33171, 87-2 BCA ¶ 19,862 (1987).

The next case to note is Allied Signal, Inc. v. United States, 941 F.2d 1194 (Fed. Cir. 1991). The Air Force reduced the contract price on a multi-year contract pursuant to an Economic Price Adjustment clause, and withheld progress payments to recoup the resulting overpayment. The contractor tried to invalidate the withholding because of noncompliance with 31 U.S.C. § 3716. The Federal Circuit reviewed the Claims Court's decision in Avco and the ASBCA's decision in Fairchild Republic, and agreed with the analysis in those cases:

"We find the reasoning of the Claims Court and the ASBCA persuasive. 'Debt' as used in the [Debt Collection Act] contemplates an existing liability by the contractor, rather than a denial of further liability by the Government within an on-going contract." 941 F.2d at 1198.

While the courts and boards were in general agreement that section 3716 should not apply to the use of offset to collect a debt arising under the same contract, the Armed Services Board of Contract Appeals found the Debt Collection Act applicable where the debt arose under a different contract. In DMJM/Norman Engineering Co., ASBCA No. 28154, 84-1 BCA ¶ 17,226 (1984), IBM Corporation, ASBCA Nos. 28821, 29106, 84-3 BCA ¶ 17,689 (1984), and Snowbird Industries, Inc., ASBCA No. 33171, 87-2 BCA ¶ 19,862 (1987), the board invalidated offsets because of noncompliance with the procedural requirements of 31 U.S.C. § 3716.

However, the Debt Collection Act was found inapplicable in B & A Electric Co., ASBCA No. 33667, 88-2 BCA ¶ 20,553 (1987). In that case, the Air Force withheld money due under one contract to satisfy a Labor Department claim for violation of the labor standards provisions of another contract. Because the Labor Department has exclusive jurisdiction over labor standards disputes, the board dismissed the appeal for want of jurisdiction, but expressed the opinion that the Debt Collection

Act would not apply. The board pointed out that the withholding in that case was authorized by labor standards contract clauses which served the same purpose and had the same effect as contract price reductions. Thus:

> "Appellant's non-compliance with the labor standards provisions triggered the Government's right to withhold payments pursuant to these specific provisions. This was an act of contract administration and did not constitute an administrative offset . . . . Hence, there was no debt to require the application of the DCA procedures."

88-2 BCA at 103,822. The board further noted that imposition of the Debt Collection Act offset procedures on the specific Labor Department procedures would result in duplication inconsistent with 4 C.F.R. § 101.7. Id. at 103,823,

The next case in this evolutionary process is Cecile Industries v. Cheney, 995 F.2d 1052 (Fed. Cir. 1993). The contractor had delivered goods which did not conform to specifications, and the government incurred substantial corrective costs which it offset against payments due under both the contract in question and two separate contracts. Emphasizing that the Debt Collection Act did not abrogate the government's common-law right of offset, which applies to both inter-contractual and intra-contractual debts, the court not only held 31 U.S.C. § 3716 inapplicable to the offset under the same contract (the Avco result), but went a step further and held it inapplicable as well to the offsets under the separate contracts.

It would thus appear settled that 31 U.S.C. § 3716 will for the most part not apply to offsets under the same contract. The extent to which Cecile Industries may or may not mandate the same result for offsets under separate contracts is likely to engender further debate.

d. Other Specific Contexts

(1) Transportation claims

As a general proposition, the Federal Claims Collection Act and the government's right of setoff apply fully to transportation claims against carriers, augmented by a separate provision of law, 31 U.S.C. § 3726(b), which authorizes the government to use administrative offset to recoup overcharges not later than 3 years after payment of a carrier's bill.

The Court of Claims has held that 31 U.S.C. § 3726(b) does not extinguish the government's common-law right of offset. IML Freight, Inc. v. United States, 639 F.2d 676 (Ct. Cl. 1980); Burlington Northern Inc. v. United

States, 462 F.2d 526 (Ct. Cl. 1972). Thus, administrative offset is not limited to the recovery of overcharges, but may be used to collect claims resulting from such things as freight loss damage (IML) and unauthorized use of government property (Burlington).

The government becomes entitled to invoke setoff when it establishes a prima facie case of carrier liability which the carrier is unable to rebut. The government establishes a prima facie case of liability by showing that the shipment was delivered to the carrier at origin in good condition (evidenced, for example, by a bill of lading signed by the carrier without exception), that the shipment arrived at its destination in damaged condition, and by establishing the amount of damages. Decisions applying the government's right of setoff to transportation claims include 56 Comp. Gen. 264 (1977); B-193101, March 12, 1979; B-191889, October 2, 1978, aff'd upon reconsideration, B-191889, May 16, 1979; B-181871, February 11, 1977.

Other cases under 31 U.S.C. § 3726(b) involve issues of corporate identity resulting from mergers, corporate acquisitions, etc. The rules are discussed in 61 Comp. Gen. 526 (1982) and B-193966, April 12, 1979.

(2) Trust funds

As a general proposition, funds which the government is holding as trustee are not subject to setoff to liquidate government claims against the beneficiaries, at least where the funds cannot be regarded as government funds. For example, federal prisoners' trust funds are not subject to setoff to satisfy government claims against the inmates. 48 Comp. Gen. 249 (1968). The same result would presumably apply to the trust accounts of patients in Department of Veterans Affairs hospitals. Similarly, funds received from the Government of Poland awarded to a claimant by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949 could not be used to set off the claimant's indebtedness to the United States. B-180825-O.M., July 23, 1974. A similar situation would be funds withheld from a contractor and transferred to GAO under the Davis-Bacon Act in specific amounts for specified employees. See 46 Comp. Gen. 178 (1966).

However, where the funds constitute government funds, they may be subject to setoff even though held in a trust capacity. 34 Comp. Gen. 152 (1954) (moneys held in trust for Indians available to set off indebtedness of Indian to government); B-121910, November 29, 1954 (same); B-121946,

January 5, 1956 (claimant's debt to government may be set off against award by Foreign Claims Settlement Commission under War Claims Act of 1948). Thus, in determining whether setoff is available, it is necessary to examine the nature of the funds as well as their status as trust funds, plus, of course, any applicable statutory restrictions.

(3) Setoff and bankruptcy

This section will summarize the effect of a debtor's bankruptcy on the government's right of setoff. The debtor may be a corporation or other business entity or an individual, including a government employee. The bankruptcy laws are complicated, and our objective here is merely to point out some of the more important principles involved.

The bankruptcy laws have traditionally recognized the right of setoff. Subject to certain refinements specified in the statute, the Bankruptcy Code (Title 11 of the United States Code) preserves "any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case . . . ." 11 U.S.C. § 553(a).[69] These are called "pre-petition" debts.

The administrative offset authority of 31 U.S.C. § 3716 does not apply in Title 11 bankruptcy cases. Matter of Mehrhoff, 88 B.R. 922, 931 (Bankr. S.D. Iowa 1988); In re Britton, 83 B.R. 914, 917 (Bankr. E.D.N.C. 1988). This is because subsection 3716(c)(2) expressly makes section 3716 inapplicable "when a statute explicitly provides for or prohibits using administrative offset to collect the claim or type of claim involved," and the Bankruptcy Code is such a statute.

Setoff under 11 U.S.C. § 553 is neither mandatory nor automatic. Under 11 U.S.C. § 362, the filing of a petition, voluntary or involuntary, under Title 11 operates as an automatic stay of all further collection efforts, including:

"(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

"(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; . . ." Id. §§ 362(a)(6), (a)(7).

[69]The debtor's right to offset against allowed government claims is found in 11 U.S.C. § 106(b).

Thus, in order to invoke setoff under 11 U.S.C. § 553, even if the government has filed a proof of claim, it is first necessary to petition the court for relief from the automatic stay. E.g., United States v. Rinehart, 88 B.R. 1014, 1018 (D.S.D. 1988), aff'd in part, rev'd in part, 887 F.2d 165 (8th Cir. 1989); In re Britton, 83 B.R. at 919; 68 Comp. Gen. 215, 219 (1989). Whether or not to grant the motion for relief is within the "equitable discretion" of the bankruptcy court. Rinehart, 88 B.R. at 1018. An attempted offset without obtaining relief from the automatic stay is illegal. Further, an agency may be found to have "waived" its right to setoff by failing to timely assert it in the bankruptcy proceeding. In re Apex Int'l Management Services, Inc., 155 B.R. 591, 595–96 (Bankr. M.D. Fla. 1993).

The automatic stay also applies to the commencement or continuation of any judicial or administrative proceeding against the debtor that was or could have been commenced prior to filing. 11 U.S.C. § 362(a)(1). Whether a proceeding is "against the debtor" is determined by reference to the posture of the initial proceeding. Thus, if a proceeding was initiated by the debtor, a subsequent bankruptcy filing does not require the stay of appellate proceedings. Freeman v. Commissioner, 799 F.2d 1091 (5th Cir. 1986).

The non-applicability of the automatic stay to proceedings initiated by the debtor may operate to permit certain setoffs. One such case is 4-J Sales & Service, DOT BCA No. 1904, 89-1 BCA ¶ 21,209 (1988). The Army had asserted a claim against a defaulted contractor for excess reprocurement costs. Unable to collect, the Army added the contractor to the Army Holdup List. The Coast Guard noticed the listing and notified the contractor of its intent to offset against a Coast Guard contract. It did so, and transmitted the funds to the Army. Subsequently, the contractor filed a claim with the Coast Guard for return of the money, which the contracting officer denied, and also filed a petition in bankruptcy. The board found the setoff proper and unaffected by the automatic stay provision of 11 U.S.C. § 362.

A debtor may be able to avoid a setoff made within 90 days prior to the filing of the bankruptcy petition. Depending on the case law in the particular jurisdiction, the legal basis may be 11 U.S.C. § 547(b) (preferential transfer) or 11 U.S.C. § 553(b) (avoidable offset). Cases discussing each approach, respectively and in detail, are In re Hancock, 137 B.R. 835 (Bankr. N.D. Okla. 1992), and In re Hankerson, 133 B.R. 711 (Bankr. E.D. Penn. 1991). Both cases involved attempted offsets against tax refunds under 31 U.S.C. § 3720A.

Setoff under 11 U.S.C. § 553 requires "mutuality of parties." The debts must be "in the same right and between the same parties, standing in the same capacity." 4 Collier on Bankruptcy ¶ 553.04[3] (15th ed. 1985). The question of whether the requisite mutuality exists between different federal agencies has engendered considerable litigation. The majority of courts have held that it does. For example, in United States v. Rinehart, 88 B.R. 1014 (D.S.D. 1988), the Small Business Administration wanted to set off a claim for defaulted loan repayments against program payments owed to the debtor by the Commodity Credit Corporation. Although the setoff was found to be improper because SBA had violated the automatic stay provision, the court held that SBA and CCC stood in mutual capacity for purposes of section 553. Other cases expressing the majority rule are In re Apex Int'l Management Services, Inc., 155 B.R. 591, 594 (Bankr. M.D. Fla. 1993); Matter of Butz, 154 B.R. 541 (S.D. Iowa 1993); Waldron v. Farmers Home Administration, 75 B.R. 25 (N.D. Tex. 1987); In re Sound Emporium, Inc., 70 B.R. 22 (W.D. Tex. 1987), aff'g 48 B.R. 1 (Bankr. W.D. Tex. 1984); In re Mohar, 140 B.R. 273 (Bankr. D. Mont. 1992); In re Fryar, 93 B.R. 101 (Bankr. W.D. Tex. 1988); In re Britton, 83 B.R. 914 (Bankr. E.D.N.C. 1988).

Cases taking a contrary view and denying mutuality where different agencies are involved include In re Ionosphere Clubs, Inc., 164 B.R. 839 (Bankr. S.D.N.Y. 1994); In re Hancock, 137 B.R. 835 (Bankr. N.D. Okla. 1992); Matter of Mehrhoff, 88 B.R. 922 (Bankr. S.D. Iowa 1988). Mehrhoff relied on the bankruptcy court's decision in In re Rinehart, 76 B.R. 746 (Bankr. D.S.D. 1987). However, that portion of the decision was subsequently repudiated by the district court in United States v. Rinehart, cited above.[70]

In addition, the mutuality for purposes of 11 U.S.C. § 553 must exist "before the commencement of the case." In other words, the debt owing to the government and the debtor's claim against the government must both be pre-petition. Thus, if both claims are in existence at the time the petition in bankruptcy is filed, setoff will generally be appropriate. 7 Comp. Gen. 186 (1927); 7 Comp. Gen. 576 (1928); 18 Comp. Gen. 301 (1938).[71]

For example, in two cases involving bankrupt carriers, setoff was proper where both the credit due the carrier for services rendered and the carrier's debt to the government arose prior to the filing of the petition in

[70]Most of these cases are the result of the farm crisis of the 1980s.

[71]Most of the GAO decisions and opinions cited in the text predate the automatic stay requirement. We include them to illustrate the types of situations in which setoff has been permitted. In applying them today, however, we caution that the requirements of 11 U.S.C. § 362 must be read in.

bankruptcy. B-150463-O.M., March 18, 1963; B-149191-O.M., August 3, 1962. Similarly, the Navy could set off a member's indebtedness stemming from various overpayments against unpaid leave rations where both obligations pre-dated the member's filing of a voluntary petition in bankruptcy. B-195066, September 22, 1980. See also 56 Comp. Gen. 279 (1977); B-123016, April 11, 1955; B-129669-O.M., December 11, 1956; B-117500-O.M., November 4, 1953.

Where one obligation arises prior to filing the petition and the other obligation arises after the filing, setoff is improper. For example, overcharges for transportation performed before the carrier filed its petition in bankruptcy could not be set off against post-petition bills payable to the carrier by the General Services Administration. B-192974, March 29, 1979. Reversing the sequence, overcharges for services rendered subsequent to the filing could not be collected by setoff against credits for pre-petition services. B-150294-O.M., March 27, 1963. See also B-129669-O.M., December 11, 1956.

The fact that a debt is contingent and unliquidated does not necessarily preclude setoff under 11 U.S.C. § 553. The Bankruptcy Code defines "debt" as "liability on a claim," and "claim" as including "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Id. §§ 101(11), 101(4). The Britton and Fryar cases cited above include discussions of this issue.

While setoff under 11 U.S.C. § 553 usually involves pre-petition debts, there is some authority for allowing the setoff of mutual post-petition debts. In re Apex Int'l Management Services, Inc., 155 B.R. 591, 594–95 (Bankr. M.D. Fla. 1993). Of course, if both obligations arise post-petition and the bankrupt's debt to the government is not included in the discharge in bankruptcy, the bankruptcy proceedings have no bearing and setoff is proper. 45 Comp. Gen. 342, 345 (1965).

The concept of mutuality is also relevant to setoffs against an employee's retirement account. An employee is not entitled to the sums in his or her retirement account until the employee leaves federal service by retirement or resignation. Thus, where an employee files bankruptcy and continues in federal employment, the money in the employee's retirement account does not become part of the estate in bankruptcy and is not available for setoff since it does not constitute an obligation owed by the government at the

time the bankruptcy petition is filed. See 22 Comp. Gen. 330 (1942); B-185731, March 3, 1976 (non-decision letter).

The mutuality concept has also been applied by analogy in state court liquidation and insolvency proceedings. In B-167886/B-174985, June 1, 1978, the Comptroller General held setoff proper against a surety which was being liquidated in a state court proceeding, since the debts and credits being set off accrued before commencement of the liquidation proceeding. The government did not waive its right of setoff by filing proofs of claim in the proceeding.

In a 1986 Claims Court case, the Government Printing Office was trying to collect a claim for excess reprocurement costs from a defaulted contractor by offset against the proceeds of other completed contracts. A state court had declared the contractor insolvent and had appointed an assignee for benefit of creditors. Since the assignee had been appointed prior to the default termination, the court found that mutuality of parties existed. Noting that federal bankruptcy law had no direct application in the case, the court affirmed a board of contract appeals decision sustaining the setoff. Tatelbaum v. United States, 10 Cl. Ct. 207 (1986).

A completing surety has priority over a trustee in bankruptcy. 8 Comp. Gen. 58 (1928). Also, a completing performance bond surety is entitled to reimbursement of its actual completion costs free from setoff of the contractor's debts. Combining these two concepts, where a performance bond surety has undertaken to complete the remaining work left by a defaulted contractor which had filed a bankruptcy petition, contract funds in the hands of the government are payable first to the completing surety to reimburse its completion costs, without setoff for the contractor's tax indebtedness. 58 Comp. Gen. 295 (1979).

A discharge in bankruptcy releases the bankrupt from legal liability on all debts included in the discharge. 45 Comp. Gen. 342 (1965); 22 Comp. Gen. 1119 (1943); 22 Comp. Gen. 330 (1942); B-194360, February 15, 1980; B-192974, March 29, 1979. A debt is included in the discharge if it was listed on the bankrupt's schedule of debts, even though the creditor was not served with notice of the proceedings or had no actual knowledge of them. A debt is discharged even if not listed on the schedule if the creditor has notice or actual knowledge of the proceedings. Failure by the creditor to file a proof of claim will not prevent operation of the discharge as a bar to a claim which is provable and which otherwise would be released. 22 Comp. Gen. 1119, 1120 (1943).

A discharge in bankruptcy

"operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor, whether or not discharge of such debt is waived."

11 U.S.C. § 524(a)(2). Thus, a debt discharged in bankruptcy cannot be set off against currently payable obligations (such as salary or a new claim) that arose subsequent to the discharge. 45 Comp. Gen. 342 (1965); B-194360, February 15, 1980. Nor may the debt be set off against retirement funds when they become payable. 22 Comp. Gen. 1119 (1943); 22 Comp. Gen. 330 (1942); B-185731, March 3, 1976. Similarly, the withholding of current social security benefit payments to recoup a discharged pre-petition benefit overpayment violates the injunction and may subject the government to sanctions. In re Cost, 161 B.R. 856 (Bankr. S.D. Fla. 1993).

However, a setoff allowable under 11 U.S.C. § 553 may survive a discharge. For example, the Ninth Circuit has held that the right of setoff under 11 U.S.C. § 553 is not defeated by a discharge of pre-petition debts in a Chapter 11 bankruptcy. In re De Laurentiis Entertainment Group, 963 F.2d 1269 (9th Cir. 1992).[72] Similarly, the Internal Revenue Service can offset a tax claim against a refund, both pre-petition, notwithstanding the taxpayer's discharge in a Chapter 7 proceeding. Posey v. United States Department of the Treasury—Internal Revenue Service, 156 B.R. 910 (W.D.N.Y. 1993).[73]

Prior to the 1978 revision of the Bankruptcy Act, GAO had taken the position that a discharge in bankruptcy did not extinguish the debt. It merely provided a legal defense against enforcement, and the decisions frequently noted that a moral obligation to pay continued. E.g., 45 Comp. Gen. 342 (1965); B-192974, March 29, 1979. The Comptroller General had pointed out that this moral obligation should be viewed as particularly strong where the bankrupt continued to receive a government paycheck, stating in one decision that if the employee did not share this concept of morality:

"[I]t would appear advisable in the interest of efficient and sound administration of Government affairs that officials of the department in which the person is currently

[72]The De Laurentiis court noted that courts have reached a different result under Chapter 13. 963 F.2d at 1275.

[73]This is clearly the majority view although it is not unanimous. De Laurentiis, 963 F.2d at 1276.

employed be informed of the situation so as to enable them to decide whether it would be in the interest of the United States to permit that type of employee to continue in the service." 22 Comp. Gen. 330, 334 (1942).

Times have changed, and the current Bankruptcy Act provides increased protection for debtors. Senate Report No. 95-989, quoted in the Revision Note following 11 U.S.C. § 524, states:

"The injunction is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts. . . . [Section 524] is intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it. In effect, the discharge extinguishes the debt, and creditors may not attempt to avoid that."

In addition, a governmental unit may not "deny employment to, terminate the employment of, or discriminate with respect to employment against" a bankrupt solely because of the bankruptcy. 11 U.S.C. § 525. In view of this, except to the extent the right of setoff has been expressly preserved, the discharged debtor's "moral obligation" remains purely moral, and dicta to the contrary such as the quoted passage from 22 Comp. Gen. 330 should be disregarded.

Special instructions for debt collection where the debtor is involved in bankruptcy proceedings are contained in Title 4 of the GAO Policy and Procedures Manual for Guidance of Federal Agencies.

(4) Miscellaneous cases

The propriety of collection by setoff may come into question in a wide variety of situations. Following are miscellaneous cases in which GAO upheld the government's right of setoff. For the most part, the cases merely discuss the basic right and do not address applicable procedures, which have generally changed anyway since enactment of the Debt Collection Act.

- Government claims against insurance companies may be set off against subrogation awards under the Federal Tort Claims Act. If the award is $2,500 or less, the settling agency makes the setoff directly. If the award exceeds $2,500, GAO makes the setoff in accordance with 31 U.S.C. § 3728. B-135984, May 21, 1976.

- Indebtedness resulting from default on a Veterans Administration loan could be set off against back pay payable to the debtor under private relief legislation. B-139924, November 21, 1960.
- Social Security payments are subject to setoff. A-89228, April 29, 1938. So are railroad unemployment insurance benefits. B-10614, August 26, 1940.
- The Railroad Retirement Board could set off amounts owed by railroads under the Railroad Unemployment Insurance Act against reimbursements due to those railroads from the Regional Rail Transportation Protective Account for employee protection payments. 59 Comp. Gen. 143 (1979). (The legislation involved in this case was changed in 1981.)
- Where a lessor failed to repaint the leased premises in violation of the lease, the lessee agency could set off the costs of repainting against lease payments. 48 Comp. Gen. 289 (1968). (This case can be viewed as a variety of contract setoff.)
- Where a lending institution files a claim with the Department of Housing and Urban Development under the mobile home loan insurance program authorized by Title I of the National Housing Act, HUD may set off against allowable payments the amount of unpaid premiums attributable to that claim prior to the date the claim was filed. 56 Comp. Gen. 279 (1977).
- A federal agency may use setoff to collect a debt owed by the District of Columbia government since the D.C. government is not another federal agency.[74] However, setoff against funds withheld from salaries of agency employees for payment of D.C. income tax is improper on public policy grounds. 60 Comp. Gen. 710 (1981).

e. State and Local Governments

The government's common-law right of offset has traditionally been held applicable to claims against states or municipalities. E.g., Georgia v. Califano, 446 F. Supp. 404, 412 (N.D. Ga. 1977). The government's position has been that the United States may set off its claims against any moneys payable to any agency of the state or municipality. E.g., B-154778, August 6, 1964; B-143573, May 7, 1962; B-141018, February 11, 1960 (non-decision letter). Administrative offset against state and local governments has also been upheld under the pre-1982 version of the Federal Claims Collection Act and its implementing regulations. E.g., Missouri ex rel. Freeman v. Block, 690 F.2d 139, 144 (8th Cir. 1982) (offset by Department of Agriculture to recover lost receipts from sale of food stamp coupons).

[74]Since the District of Columbia is not an agency of the United States, it follows that money owed by the United States to one who is indebted to the District of Columbia is not available for offset to liquidate the debt. 36 Comp. Gen. 457 (1956) (retirement funds); B-39254, February 10, 1944 (contract payments).

Government claims often arise from improperly collected state and local taxes. If the state or municipality refuses to refund the tax, setoff has been held to be the proper remedy. For example, the government's claim for the refund of real estate taxes on government-owned property collected from a contractor who was reimbursed by the government was properly set off against payments in lieu of taxes due the municipality in a subsequent year. 36 Comp. Gen. 713 (1957). Similarly, the overpayment by the government of a state motor vehicle fuel tax on gasoline used in government vehicles was properly set off against funds payable to the state under the Mineral Leasing Act of 1920. B-154113, June 24, 1964. See also, e.g., B-162005, April 8, 1968, and B-150228, August 5, 1963.

The Debt Collection Act of 1982 complicated the picture. As we have seen, section 10 of the Debt Collection Act, 31 U.S.C. § 3716, did not create a new right of offset. It merely gave a statutory basis, with procedural protections, to a right which had long existed under the common law. Section 10 applies to "persons," and defines "person" as not including units of state or local government. 31 U.S.C. § 3701(c). The Federal Claims Collection Standards construe section 3701(c) as merely an exemption from the statutory authorities and procedures of section 3716, thus preserving the common-law right of offset against state and local governments. 4 C.F.R. § 102.3(b)(4); 49 Fed. Reg. at 8891 (Supplementary Information Statement). The controversy over the effect of section 3701(c) is identical to that arising under 31 U.S.C. § 3717 with respect to the assessment of interest. The issue and case law are fully discussed earlier in this chapter under the Interest heading.

4. Government Employees

a. Law Prior to the Debt Collection Act

A long line of Comptroller General decisions established the proposition that the current salary of a government employee is not subject to setoff to liquidate the employee's indebtedness to the United States unless specifically authorized by statute or unless the employee consents to the setoff. 58 Comp. Gen. 501, 502 (1979); 32 Comp. Gen. 499 (1953); 29 Comp. Gen. 99 (1949); 26 Comp. Gen. 907 (1947); 23 Comp. Gen. 911 (1944); 23 Comp. Gen. 555 (1944); 17 Comp. Gen. 12 (1937). The rule applies equally to the current pay of members of the armed services. E.g., 42 Comp. Gen. 83 (1962); 38 Comp. Gen. 788 (1959). GAO applied the rule regardless of the size of the debt. A-20456, February 27, 1928

One court of appeals has suggested that the rule restricts the government's common-law right of setoff more than is necessary. United States v. Tafoya, 803 F.2d 140, 142 (5th Cir. 1986). Be that as it may, the question has become largely moot since all salary offsets now have a statutory basis.

Salary offset prior to the Debt Collection Act was not entirely a common-law offset. Several statutes in Title 5 of the U.S. Code, the pre-Debt Collection Act version of 5 U.S.C. § 5514 for example, authorized salary offset in specific situations. However, these statutes filled only part of the gap. Unless one of them applied, current salary was not subject to setoff without the employee's consent.

The rule prohibiting salary offset without either statutory authority or the employee's consent applied only to current salary. Other moneys payable to an employee were subject to setoff. One example was retirement benefits. Others are:

- "Final pay" for both civilian employees and military personnel. 38 Comp. Gen. 788 (1959); 33 Comp. Gen. 443 (1954); 29 Comp. Gen. 99, 100 (1949). This includes final salary payments on behalf of a deceased employee. B-190291, January 3, 1978.
- Lump-sum payment for accrued leave. 29 Comp. Gen. 99, 100 (1949); B-190291, January 3, 1978.
- Payments, either periodic or lump-sum, under the Federal Employees Compensation Act. 41 Comp. Gen. 178 (1961).

Thus, prior to 1982, employee setoffs fell into one of three categories: (1) setoff against current salary under one of the specific statutes; (2) setoff against payments other than current salary, authorized under the common law; and (3) setoff against current salary in situations not covered by statute. The setoff could be made in categories (1) and (2); in category (3), the employee's consent was required.

b. Salary Offset: 5 U.S.C. § 5514

The most widely applicable salary offset statute is 5 U.S.C. § 5514, originally enacted in 1954 and substantially amended by section 5 of the Debt Collection Act of 1982.

Prior to the 1982 amendments, section 5514 applied only to the recovery of erroneous payments made by the employing agency. It did not extend to debts owed to other agencies (34 Comp. Gen. 170, 173 (1954); B-127814, October 29, 1956), or to debts to the employing agency resulting from

other than erroneous payments (42 Comp. Gen. 619 (1963)). Thus, for example, an agency could use section 5514 to offset an erroneous overpayment of salary to one of its employees, but not to recover a delinquent student loan. Section 5 of the Debt Collection Act extensively revised 5 U.S.C. § 5514 to include general indebtedness and to provide procedural protections for the debtor.

Agencies are required to issue implementing regulations which must be consistent with the Federal Claims Collection Standards and approved by the President. 5 U.S.C. §§ 5514(a)(3), (b)(1). The President has delegated approval authority to the Office of Personnel Management (OPM).[75] The Federal Claims Collection Standards do not address salary offset under section 5514. OPM has issued governmentwide regulations, found at 5 C.F.R. Part 550, Subpart K, which include minimum requirements for individual agency regulations.

The Treasury Department's Financial Management Service has issued detailed guidance on the use of 5 U.S.C. § 5514 in a publication entitled Guidelines for the Federal Employee Salary Offset Program: A Practical Guide for Collecting Debt Through Salary Offset (May 1988).

Perhaps the best way to outline the key aspects of 5 U.S.C. § 5514 is through a question-and-answer format.

(1) Which agencies may use 5 U.S.C. § 5514?

The statute itself, 5 U.S.C. § 5514(a)(1), refers merely to the "head of an agency." The original section 5514 had been construed as not limited to the executive branch. 34 Comp. Gen. 170, 173 (1954). Nothing in the Debt Collection Act suggests a contrary intent. Thus, section 5514 applies to all agencies and independent establishments in the executive, legislative, and judicial branches of the federal government. 5 C.F.R. § 550.1103; B-217402.2, July 15, 1988; B-217402, June 10, 1985.[76]

(2) Which employees are subject to setoff under section 5514?

For purposes of 5 U.S.C. § 5514, the term "employee" includes all current civilian employees and all current members of the Armed Forces and Armed Forces Reserves. 5 U.S.C. § 5514(a)(1); 5 C.F.R. § 550.1103.

[75]Executive Order No. 11609, § 8 (1971); Executive Order No. 12107, § 2-101 (1978).

[76]Although GAO has questioned the applicability of 5 U.S.C. § 5514 to the Senate and House of Representatives (B-217402.2, July 15, 1988), they are included in the OPM regulations.

Through a definitional quirk, however, section 5514 does not apply to commissioned officers of the Public Health Service. 64 Comp. Gen. 395, 401 (1985).

(3) What kinds of debts may be set off?

One of the primary objectives of section 5 of the Debt Collection Act was to expand 5 U.S.C. § 5514 to include "general debts." S. Rep. No. 378, 97th Cong., 2d Sess. 10–11 (1982), reprinted at 1982 U.S. Code Cong. & Admin. News 3377, 3386–87. Thus, any debt owed by an employee to the United States—including debts resulting from fraudulent claims (e.g., B-224750, September 25, 1987)—may be set off under section 5514, except (a) debts to which the Debt Collection Act of 1982 does not apply,[77] and (b) debts for which salary offset is expressly provided for or prohibited by some other statute.

(4) What payments are available for setoff under section 5514?

Setoff is made against the individual's "current pay account." The statute refers to "basic pay, special pay, incentive pay, retired pay, retainer pay, or, in the case of an individual not entitled to basic pay, other authorized pay." 5 U.S.C. § 5514(a)(1). This includes "retired pay" payable to members or former members of the uniformed services, but not the "retirement pay" of civilian employees. 64 Comp. Gen. 907, 909–10 (1985).

What about allowances? In the parlance of federal employee compensation, pay and allowances are usually regarded as two different things. While GAO has not addressed this issue in a formal decision, it has expressed the opinion in an internal memorandum that section 5514 does not apply to offset against allowances. B-213507-O.M., September 12, 1984.

Offset against an individual's final salary check or lump-sum leave payment upon retirement or resignation is not governed by 5 U.S.C. § 5514 unless it is the continuation of an offset against current salary initiated under section 5514. 64 Comp. Gen. 907 (1985).

(5) What procedures are required?

[77]In the salary offset context, this means debts arising under the Internal Revenue Code, the Social Security Act, or the tariff laws of the United States. See Pub. L. No. 97-365, § 8(e), 5 U.S.C. § 5514 note; 5 C.F.R. § 550.1102(b)(1).

Before taking an offset against an employee's salary under section 5514, the agency must give the employee at least 30 days' written notice of its intent to use salary offset, and must provide the following rights:

- Opportunity to inspect and copy government records relating to the debt;
- Opportunity to negotiate a written repayment agreement; and
- Opportunity for a hearing on the existence and amount of the debt and on repayment terms where not established by written agreement.

The agency must provide a hearing if the employee requests one within 15 days after receipt of the agency's notification. The hearing must be conducted by someone not under the supervision or control of the agency, or by an administrative law judge.[78] The hearing official must issue a decision not later than 60 days after the request. 5 U.S.C. § 5514(a)(2). Hearings are not required for pay adjustments resulting from an employee's election of, or change in, coverage under a federal benefits program requiring periodic deductions from pay if the debt accumulated over no more than four pay periods. 5 C.F.R. § 550.1104(c).

The Federal Labor Relations Authority has held that the procedures under 5 U.S.C. § 5514 are not exclusive, and that a proposal to establish the negotiated grievance procedure as an alternative, with respect to debts owed to the employing agency, is negotiable. American Federation of Government Employees, AFL-CIO, Local 1592, 33 F.L.R.A. 691 (1988). However, the alternative procedure cannot extend to debts owed to other agencies. National Association of Government Employees, Local R1-109, 37 F.L.R.A. 500 (1990); National Federation of Federal Employees, Local 29, 32 F.L.R.A. 721 (1988).

(6) How much can be set off?

The pre-1982 version of 5 U.S.C. § 5514 permitted the offset of up to two-thirds of the debtor's paycheck after certain deductions. See, e.g., 34 Comp. Gen. 164 (1954). The revised statute sets a maximum of "15 percent of disposable pay" unless the employee consents in writing to a larger amount. 5 U.S.C. § 5514(a)(1).

The OPM regulations, 5 C.F.R. § 550.1103, define "disposable pay" as:

[78]The type of hearing (oral or paper) is determined by applying the standard of 4 C.F.R. § 102.3(c) (the Supreme Court's Yamasaki test, discussed earlier in this chapter under the Due Process heading). 5 C.F.R. § 550.1104(g). Agencies are to cooperate in furnishing hearing officers to one another when needed. Id. § 550.1107.

"that part of current basic pay, special pay, incentive pay, retired pay, retainer pay, or in the case of an employee not entitled to basic pay, other authorized pay remaining after the deduction of any amount required by law to be withheld. Agencies must exclude deductions described in 5 CFR 581.105(b) through (f) to determine disposable pay subject to salary offset."

Thus, disposable pay is determined by deducting from gross pay those items listed in OPM's garnishment regulations, 5 C.F.R. §§ 581.105(b) through (f). This includes such items as amounts withheld for federal, state, and local income taxes, health insurance premiums, and required retirement contributions.

The 15 percent limitation does not apply to offsets against final salary or lump-sum leave payments. 64 Comp. Gen. 907, 911 n.1 (1985).

(7) What about routine adjustments?

In GAO's view, one of the major flaws of the revised section 5514 is its failure to explicitly exempt "routine salary adjustments"—adjustments resulting from such things as clerical error or delay in the processing of pay documents. If, for example, a clerical error results in the issuance of two paychecks, or if the decimal point is put in the wrong place resulting in a check for $5,000 rather than $500, the full range of procedures under section 5514 should not be required to recoup the overpayment.

Both GAO[79] and the Administrative Conference of the United States[80] have recommended remedial legislation to deal with the "routine adjustment" problem. The military departments, whose pay systems produce the most exposure to these problems, have obtained statutory authority to apply less stringent procedures to debts owed by military personnel.[81]

c. Salary Offset: Other Statutes

In addition to 5 U.S.C. § 5514, offset against the salary of government employees is authorized under a number of other statutes dealing with more specific situations. This section will identify several of these statutes and note their relationship to section 5514. Some of the statutes permit offset against payments other than current salary. The terms of each statute must be examined to determine its precise scope.

[79]Debt Collection: Billions Are Owed While Collection and Accounting Problems Are Unresolved, GAO/AFMD-86-39 (May 1986), at 48–51.

[80]ACUS Recommendation No. 87-9, 1 C.F.R. § 305.87-9.

[81]37 U.S.C. § 1007(c), discussed later in the text.

(1) Statutes in 5 U.S.C.

Title 5 of the United States Code contains several provisions authorizing offset against the salary or other entitlements of government personnel. Examples are:

- 5 U.S.C. § 4108(c): violation of employment agreement under Government Employees Training Act.
- 5 U.S.C. § 5511(b): indebtedness of employee removed for cause.
- 5 U.S.C. § 5512(a): withholding of individual's pay "until he has accounted for and paid into the Treasury . . . all sums for which he is liable." Since this provision is clearly directed at persons holding funds for which they must account to the government, it has been construed as applying only to accountable officers. 39 Comp. Gen. 203, 206 (1959); 37 Comp. Gen. 344 (1957); 23 Comp. Gen. 555 (1944); 26 Op. Att'y Gen. 77 (1906).
- 5 U.S.C. § 5513: authorizes setoff against current salary of the recipient of a payment for which GAO has disallowed credit in the account of a disbursing officer or raised a charge against a certifying officer. This statute was enacted in 1950 and was unaffected by the subsequent enactment of 5 U.S.C. § 5514. 34 Comp. Gen. 170 (1954). Its interpretation is discussed in 32 Comp. Gen. 101 (1952) and 32 Comp. Gen. 499 (1953).
- 5 U.S.C. § 5522(c): advance payments made to facilitate the evacuation of employees or their families and dependents from situations of imminent danger.
- 5 U.S.C. § 5705: unused or misused travel advances. A sample case is B-246056, March 10, 1992.
- 5 U.S.C. § 5724(f): travel and transportation advances incident to permanent change of station. The statute does not explicitly mention setoff but provides that the advances may be made "with the same safeguards required under section 5705 of this title." This has been construed as authorizing offset to the extent authorized under section 5705. 58 Comp. Gen. 501, 502 (1979); B-194159, October 30, 1979.

Section 5 of the Debt Collection Act did not repeal these pre-existing statutes by implication. 64 Comp. Gen. 142 (1984). Where one of these more specific statutes applies, then it, rather than 5 U.S.C. § 5514, provides the basis for and governs the offset. Id.; 5 C.F.R. § 550.1102(b)(1).

When operating under one of the more specific statutes which does not provide its own administrative procedures (as those cited do not), the agency should follow the procedural requirements of 31 U.S.C. § 3716 and 4

C.F.R. § 102.3, rather than the more stringent requirements of 5 U.S.C. § 5514. 64 Comp. Gen. 142 (1984).

(2) Public Law 97-276, section 124

The Debt Collection Act of 1982 was enacted on October 25, 1982. Three weeks earlier, on October 2, Congress enacted Pub. L. No. 97-276, 96 Stat. 1186, the continuing resolution for fiscal year 1983. Section 124 of Pub. L. No. 97-276, 96 Stat. 1195, 5 U.S.C. § 5514 note, provides for offset against the current pay account of an employee against whom the government has obtained a court judgment. Offset is to be in reasonable amounts not to exceed "one-fourth of the pay from which the deduction is made."

The Department of Justice has construed section 124 as permanent legislation and not implicitly repealed by the Debt Collection Act. Collection of Debts by Offset from Salary under § 124 of the October 1982 Continuing Resolution, Op. Off. Legal Counsel, March 11, 1983. It has also been construed as applicable only to civilian employees and not members of the armed services. United States v. Tafoya, 803 F.2d 140 (5th Cir. 1986); B-230865, October 17, 1990.

Offset under section 124 is not addressed in the Federal Claims Collection Standards or in the OPM salary offset regulations. It is included, however, in Office of Management and Budget Circular No. A-129 (part IV, sec. 4.f) and several Treasury Department publications.[82]

The most detail is found in Chapter 552 of the Federal Personnel Manual (FPM). Offset under section 124 is initiated by a request to the employing agency (called a "Requisition for Offset") from the agency which litigated the claim (usually the Justice Department). Id. § 2-1. A copy of the requisition letter is sent to the employee. Id. § 2-2.a(2). The offset is made against "disposable pay," determined in the same manner as under 5 U.S.C. § 5514. Id. §§ 1-2, 1-3.e. Amounts deducted are applied first to court costs, second to accrued post-judgment interest, and third to principal. Id. § 3-1.c. No further administrative procedures are required. In this connection, the FPM states:

"Since due process was provided to the employee by a court of the United States prior to the entry of the judgment and a Requisition submitted according to this chapter, judgment offsets do not require further due process procedures." Id. § 2-2.c.

[82]E.g., Guidelines for the Federal Employee Salary Offset Program at 15; Managing Government Credit: A Supplement to the Treasury Financial Manual at 4-19.

(The FPM was abolished on December 31, 1993, However, Chapter 552 has been "provisionally retained" through 1994 and will presumably be incorporated into some other document. Office of Personnel Management, FPM Sunset Document, OPM Doc. No. 157-53-8, at 74 (1993).)

(3) 37 U.S.C. § 1007(c)

An important salary offset statute is 37 U.S.C. § 1007(c):

"Under regulations prescribed by the Secretary concerned, an amount that a member of the uniformed services is administratively determined to owe the United States or any of its instrumentalities may be deducted from his pay in monthly installments. However, after the deduction of pay forfeited by the sentence of a court-martial, if any, or otherwise authorized by law to be withheld, the deductions authorized by this section may not reduce the pay actually received for any month to less than one-third of his pay for that month."

This statute was originally enacted in 1928 (45 Stat. 698) and prior to fiscal year 1985 was applicable only to enlisted members of the Army and Air Force. It was extended in 1984 to all members of the armed forces (98 Stat. 2492, 2613), and again in 1985 to all members of the uniformed services (99 Stat. 583, 666). The 1985 amendment picks up commissioned officers of the Public Health Service who, as noted earlier, are not covered by 5 U.S.C. § 5514.

The legislative history of the 1984 amendment makes it clear that one of its purposes was to permit routine pay adjustments without the rigorous procedures of 5 U.S.C. § 5514. Given the nature of the military pay system, the ability to make these routine adjustments is especially important to the military departments. See S. Rep. No. 500, 98th Cong., 2d Sess. 215 (1984).

Prior to the 1982 revision of 5 U.S.C. § 5514 and the 1984 amendment to 37 U.S.C. § 1007(c), GAO had struggled with the relationship of the two statutes, drawing distinctions based on the type of debt involved. E.g., 39 Comp. Gen. 46, 51 (1959); 34 Comp. Gen. 164, 168 (1954). The legislative changes of the 1980s have rendered these earlier cases obsolete. The apparent relationship today is that 37 U.S.C. § 1007(c) takes precedence over 5 U.S.C. § 5514 as the more specific and later enactment, with no distinction as to the type of debt. 69 Comp. Gen. 226 (1990). See also in this connection 5 U.S.C. § 5514(c), which expressly preserves section 1007(c).

When collecting by offset under 37 U.S.C. § 1007(c), the applicable procedures are those specified in 31 U.S.C. § 3716 and 4 C.F.R. § 102.3. 64 Comp. Gen. 142 (1984).

(4) 31 U.S.C. § 3716

Since all nonjudicial offsets, salary offset included, are varieties of "administrative offset,"[83] they are subject to the "umbrella" provision of 31 U.S.C. § 3716 unless some other more specific statute applies. In the context of federal employees, the maze of offset statutes described above has sharply reduced—but did not totally eliminate—the universe of situations in which there would be any need to look to section 3716.

For example, offset against an employee's final salary check or lump-sum leave payment is governed by 5 U.S.C. § 5514 only where it is a continuation of a salary offset initiated under section 5514. Where not a continuation of a section 5514 offset, an offset against a final salary check or lump-sum leave payment, formerly a common-law offset, is now governed by 31 U.S.C. § 3716. 64 Comp. Gen. 907 (1985); 5 C.F.R. § 550.1104(l).

Miscellaneous offsets against payments owing to government employees which are not covered by any other offset statute would be subject to 31 U.S.C. § 3716. For example, suppose an agency allows a claim by one of its employees for personal property damage under 31 U.S.C. § 3721. An offset of a debt owed to the United States against that award would be an administrative offset within the scope of section 3716.

We have devoted several pages to describing the various statutory bases for different types of employee offsets. Determining the proper statutory basis for a given offset is important because several things flow from that determination—the applicable procedural requirements, the types of payments available for offset, and, in many cases, the amount that can be deducted.

There is one common-law exception to the government's right of offset that deserves mention. Debts owed by an enlisted member of the armed forces may not be set off against allowances payable at the time of discharge for the purpose of returning the individual to his or her home or place of enlistment. The rule is based on policy considerations described as follows in a 1902 decision:

[83]64 Comp. Gen. 142, 146 (1984); 5 C.F.R. § 550.1102(b).

"The practice of returning soldiers and marines to their places of enlistment upon the expiration of their terms of service or when discharged, except by way of punishment for an offense, is based not wholly upon the contract of enlistment, but also upon the grounds of public policy. It would be highly injurious to the service, to say nothing of the country at large, to discharge soldiers without fault of their own in places distant from their homes and leave them without the means of returning thereto."

8 Comp. Dec. 624, 625 (1902).[84] The exception does not apply to a tax levy under section 6331 of the Internal Revenue Code. 36 Comp. Gen. 106 (1956). Nor does it apply to claims for reimbursement after the individual has completed his or her separation travel since the reason for the exception no longer applies. 65 Comp. Gen. 497 (1986) (discussing the exception generally and citing several of the earlier cases).

d. Offset Against Retirement Fund

This section deals with offsets against the Civil Service Retirement and Disability Fund. We start by reiterating a distinction noted above in our discussion of 5 U.S.C. § 5514—retired pay vs. retirement pay. The "retired pay" of military personnel is governed by 5 U.S.C. § 5514, and has been since its enactment. E.g., 51 Comp. Gen. 303 (1971). This is because "retired pay" is specified in the statute.

However, unlike retired pay, which is paid by the department in which the individual served, the "retirement pay" of federal civilian employees is paid not by the employing agency but by the Office of Personnel Management. Civilian retirement benefits have never been viewed as subject to 5 U.S.C. § 5514, and the Debt Collection Act did not change this.

Moneys held in an employee's retirement account are not available for setoff as long as they are required by law to remain in the Fund. However, once they become payable to the employee, by virtue of either retirement or withdrawal upon separation, they are available for setoff. Prior to the Debt Collection Act, this was viewed as a common-law offset or an offset implicitly authorized under the Federal Claims Collection Act of 1966. Wisdom v. Department of Housing and Urban Development, 713 F.2d 422 (8th Cir. 1983); Atwater v. Roudebush, 452 F. Supp. 622 (N.D. Ill. 1976); United States v. United States Fidelity & Guaranty Co., 35 F. Supp. 959, 962 (E.D. Pa. 1940); 58 Comp. Gen. 501, 502 (1979); B-195126, January 17,

[84]See also 34 Comp. Gen. 504, 506–07 (1955) (noting that the exception has never been extended to officers); 34 Comp. Gen. 164, 167 (1954); 8 Comp. Gen. 233 (1928); 20 Comp. Dec. 707 (1914); 18 Comp. Dec. 621 (1912).

1980.[85] The government's right of offset applies as well to disability retirement benefits (B-194159, October 30, 1979) and to Foreign Service retirement benefits (A-54780, February 11, 1935).

The enactment of the Debt Collection Act of 1982 did not affect the government's basic right to offset against the Civil Service Retirement and Disability Fund, except that it is now viewed as a variety of administrative offset under the umbrella provision of 31 U.S.C. § 3716. 64 Comp. Gen. 907 (1985). See also 5 C.F.R. § 550.1104(m).

Retirement Fund offsets are addressed in a separate section of the Federal Claims Collection Standards, 4 C.F.R. § 102.4. The required procedures are those specified in 4 C.F.R. § 102.3 for administrative offsets under 31 U.S.C. § 3716 generally. The creditor agency must provide the necessary procedures and, in its offset request to OPM, certify that it has done so. Id. § 102.4(b)(3). In addition, retirement fund offsets are subject to OPM regulations, found at 5 C.F.R. Part 845, Subpart D.[86]

In some cases, the creditor agency will have no way of knowing when the retirement moneys might be available. This could pose a problem under the 10-year statute of limitations of 31 U.S.C. § 3716(c)(1). In such situations, the agency should provide the administrative procedures and make the offset request to OPM right away. Then, at such future time as the debtor makes a claim for payments from the Fund, OPM can complete the offset. 4 C.F.R. § 102.4(c).

Since several years may pass between the initiation and completion of the offset under section 102.4(c), the next logical question is whether due process has a "shelf life." Certainly the passage of time should not affect the initial determination of the existence and amount of the debt. However, other relevant circumstances might change. The Standards take this into consideration:

"At such time as the debtor makes a claim for payments from the Fund, if at least a year has elapsed since the offset request was originally made, the debtor should be permitted to offer a satisfactory repayment plan in lieu of offset upon establishing that changed financial circumstances would render the offset unjust." Id.

[85]Retirement fund offsets were common long before enactment of the Federal Claims Collection Act. E.g., 39 Comp. Gen. 203 (1959); 27 Comp. Gen. 703 (1948); 21 Comp. Gen. 1000 (1942); 16 Comp. Gen. 962 (1937); 16 Comp. Gen. 161 (1936); 3 Comp. Gen. 98 (1923).

[86]OPM also has regulations for collecting debts owed to the Civil Service Retirement and Disability Fund. See 5 C.F.R. Part 831, Subpart M, and Part 845, Subparts B and C.

How much may be set off against retirement payments? The Standards provide merely that offset be "in reasonable amounts in order to collect in one full payment or a minimal number of payments." Id. § 102.4(a). The 1984 preamble, 49 Fed. Reg. at 8892, commented as follows:

"The circumstances of an offset from the Retirement Fund can be extremely variable. In one case, annuities from the Fund may be a retired employee's sole source of support. In another case, a younger debtor may be withdrawing a large lump sum upon resignation. We think agencies should have discretion to tailor the amount of the offset to the circumstances of the particular case. In general, it is our intent that the maximum possible amount be offset when a debtor is withdrawing from the Fund in a single lump sum unless there is a demonstration of undue financial hardship. When payments are in the form of annuities, however, agencies should offset in a reasonable percentage, based on such factors as the size of the debt and the age and financial condition of the debtor. We have added language, however, to emphasize that the preferred practice should be to collect in a single lump sum or a limited number of installments wherever reasonably possible.

"As a general proposition, we contemplate that the creditor agency will specify the monthly amount to be offset, subject to any ceiling the Office of Personnel Management may wish to establish by regulation."

For installment deductions, OPM has established a ceiling of "50 percent of net annuity, unless a higher percentage is needed to satisfy a judgment against a debtor within 3 years or the annuitant has consented to the higher amount in writing." 5 C.F.R. § 845.407(b).

There have been many cases affirming the right of setoff against retirement funds involving the indebtedness of postal employees resulting from mail theft, embezzlement, and other offenses. A prima facie case of liability is established by a showing that (1) the loss occurred, (2) the employee has been caught committing a similar offense, (3) the employee had access to the item in question, and (4) there is no evidence implicating anyone else. Boerner v. United States, 30 F. Supp. 35 (E.D.N.Y. 1939), aff'd, 117 F.2d 387 (2d Cir. 1941), cert. denied, 313 U.S. 587. If the employee is unable to overcome the prima facie case by more than a mere categorical denial of liability, he or she becomes indebted to the government for the amount of the loss and setoff against the employee's retirement account is proper. B-195126, January 17, 1980.[87] The rationale of the postal employee

[87]See also 23 Comp. Gen. 723 (1944); 21 Comp. Gen. 1003 (1942); 19 Comp. Gen. 88 (1939); 18 Comp. Gen. 524 (1938); 7 Comp. Gen. 593 (1928); B-170316, April 12, 1971, aff'd upon reconsideration, B-170316, November 16, 1971; B-164193, June 5, 1968; B-155160, November 9, 1964; B-150407, April 4, 1963. Cf. Parker v. United States, 187 Ct. Cl. 553 (1969) (retirement offset upheld on basis of 5 U.S.C. § 5512).

cases has been applied to other federal employees as well. B-139796, July 10, 1959.

e. Nonappropriated Fund Activities

Unless provided by statute, setoff is not available to satisfy a debt owed to a nonappropriated fund activity since a debt to a nonappropriated fund activity is not a debt owed to the United States. 43 Comp. Gen. 431 (1963); 11 Comp. Gen. 161 (1931); 9 Comp. Gen. 411 (1930); 9 Comp. Gen. 353 (1930); B-170400, September 21, 1970, aff'd upon reconsideration, B-170400, February 2, 1971; B-128671-O.M., August 22, 1956.

The same rule applies to a debt owed to a Federal Credit Union since the funds belong to the employees and are not appropriated funds. 31 Comp. Gen. 363 (1952). See also B-113003, March 5, 1953 (non-trust funds of an Indian tribe generated by local activities).

At one time, setoff was permitted to collect debts owed to nonappropriated fund activities in certain situations. E.g., 5 Comp. Gen. 25 (1925); 19 Comp. Dec. 515 (1913); 8 Comp. Dec. 860 (1902). The later prohibitory rule appears to have developed in large measure in response to Kenny v. United States, 62 Ct. Cl. 328 (1926), holding that the property of a nonappropriated fund instrumentality is not the property of the United States, in conjunction with Taggart v. United States, 17 Ct. Cl. 322 (1881) (no government official can make the United States agent or trustee for the collection of private debts). 43 Comp. Gen. 431, 433 (1963); 11 Comp. Gen. 161 (1931).

Statutory setoff authority now exists for military personnel by virtue of 37 U.S.C. § 1007(c), discussed above. The language "United States or any of its instrumentalities" in that statute has consistently been construed as encompassing nonappropriated fund instrumentalities. B-148581.13-O.M., November 2, 1976. In addition, under 10 U.S.C. § 6032, the pay of Marines who are discharged, desert, or are sentenced to prison may be set off to satisfy indebtedness to Marine Corps Exchanges. (In view of the 1984 amendment to 37 U.S.C. § 1007(c), 10 U.S.C. § 6032 would appear no longer necessary.)

Military personnel may consent to setoff to liquidate indebtedness to a nonappropriated fund activity by authorizing allotments from current salary. B-148581.13-O.M., November 2, 1976.

5. Offset Against Tax Refunds

If one is poking through the federal bushes looking for money against which to offset debts, it should not take very long to realize that tax

refunds are a fertile source. This is not a new idea. GAO studied the matter in the 1970s and concluded that there was no reason why the government's right of offset should not apply to tax refunds. B-137762.21-O.M., January 3, 1977. In fact, offset against tax refunds had been used in the past, although not widely, and had been upheld by the courts. Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536 (1946); Luther v. United States, 225 F.2d 495 (10th Cir. 1954); Belgard v. United States, 232 F. Supp. 265 (W.D. La. 1964).

In 1979, GAO formalized its position in a report entitled The Government Can Collect Many Delinquent Debts by Keeping Federal Tax Refunds as Offsets, FGMSD-79-19 (March 9, 1979). The Internal Revenue Service had misgivings, however, largely on policy grounds. In essence, the IRS felt that the nature of its mission made its agents unpopular enough to begin with, and adding this new role could adversely affect tax administration. GAO recognized the validity of IRS' concern, but nevertheless thought the offset idea was a good one:

> "It is patently unfair to the honest citizen who pays his debts to the Government to allow other debts to go uncollected. This inequity is especially acute when the individual owing the debt has the ability to pay but does not, and the validity or amount of the debt is not in dispute." FGMSD-79-19 at 17.

Congress dipped its legislative toe into this new water first in 1981 by authorizing past-due child and spousal support payments under the Aid to Families with Dependent Children program to be offset against tax refunds and paid over to the respective states. 42 U.S.C. § 664; 26 U.S.C. § 6402(c).

Three years later, Congress expanded the concept to cover debts owed to the United States. The pertinent legislation is section 2653 of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1153, codified at 31 U.S.C. § 3720A and 26 U.S.C. § 6402(d). Under this legislation, as amended by section 3 of the Cash Management Improvement Act Amendments of 1992, Pub. L. No. 102-589, 106 Stat. 5133, federal agencies, including government corporations, are required to report "past-due legally enforceable" debts to the IRS at least once a year, to be offset against tax refunds. Before referring a debt to the IRS, the agency must (1) notify the debtor of its intent to report the debt to IRS; (2) give the debtor at least 60 days to present evidence that all or part of the debt is not past due or legally enforceable; and (3) consider any evidence so presented. 31 U.S.C. § 3720A(b). The agency must also certify that it has made reasonable efforts to collect. Id.

The original legislation applied to refunds payable prior to January 1, 1988. The sunset date was extended in 1988,[88] and the program made permanent in 1991.[89] The program operated as a pilot program for its first two years. Five agencies were included for the first year (1986); three more were added for 1987. All federal agencies are now supposed to be included.

The Treasury Department is required to issue regulations to implement the tax refund offset program, and agencies in turn are required to follow these regulations. 31 U.S.C. §§ 3720A(a), (d). Treasury's regulations are found at 26 C.F.R. § 301.6402-6. To be eligible to participate, a federal agency must have its own offset regulations. Id. § 301.6402-6(b)(1). Under other subsections of this regulation, the debt must be at least $25, and the agency must have explored offset possibilities under other authorities and, for debts over $100, must have reported the debt to a consumer reporting agency under 31 U.S.C. § 3711(f). A debtor wishing to challenge the offset may sue the creditor agency but may not sue the Treasury Department or the IRS. 26 U.S.C. § 6402(e). There is no requirement to exhaust any administrative remedy which might be available. Bolden v. Equifax Accounts Receivable Services, 838 F. Supp. 507 (D. Kan. 1993).

The Treasury regulations expressly provide that using a taxpayer's most recent address obtained from the IRS will satisfy the agency's duty to give notice, unless the taxpayer has provided "clear and concise notification" to use a different address. 26 C.F.R. § 301.6402-6(d)(1). Use of the mailing address obtained from the IRS has been upheld as reasonable. Setlech v. United States, 816 F. Supp. 161 (E.D.N.Y. 1993). "The means used to provide notice need not eliminate all risk of non-receipt." Id. at 167.

The refund offset program has been upheld against a constitutional due process challenge. Richardson v. Baker, 663 F. Supp. 651 (S.D.N.Y. 1987). Offset under 31 U.S.C. § 3720A is not subject to state law personal property exemptions. Bosarge v. United States Department of Education, 5 F.3d 1414 (11th Cir. 1993).

The program has been studied extensively. GAO's conclusion is reflected in the title of its report, Tax Policy: Refund Offset Program Benefits Appear

[88]Family Support Act of 1988, Pub. L. No. 100-485, § 701(a), 102 Stat. 2343, 2425 (1988).

[89]Emergency Unemployment Compensation Act of 1991, Pub. L. No. 102-164, § 401, 105 Stat. 1049, 1061 (1991).

to Exceed Costs, GAO/GGD-91-64 (May 1991).[90] The Office of Management and Budget has reported that the refund offset program is succeeding in collecting delinquent debt. For calendar year 1988, collections totalled over $318 million, of which $82 million was voluntarily repaid upon the receipt of notification letters.[91] A congressional report states that from January 1986 through July 1992, the program resulted in the collection of almost $2.8 billion in delinquent debt.[92]

6. The Federal Tax Levy

As noted previously in this chapter, the Debt Collection Act of 1982 and the Federal Claims Collection Standards do not apply to debts arising under the Internal Revenue Code. Thus, for the most part, this chapter has not dealt with tax claims. However, a discussion of offset would not be complete without some mention of the tax levy.

If a taxpayer neglects or refuses to pay a tax after receiving notice and demand, the Internal Revenue Service may "levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax." 26 U.S.C. § 6331(a). Section 6334(a) lists a number of exemptions, such as wearing apparel, tools of the trade up to a specified limit, unemployment benefits, worker's compensation, and a minimum salary exemption. Section 6334(c) then provides:

> "Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)."

This authority is extremely broad, and indicates that "Congress meant to reach every interest in property that a taxpayer might have." United States v. National Bank of Commerce, 472 U.S. 713, 720 (1985). The constitutionality of the levy provisions has been upheld. Id. at 721.

Prior to the 1954 version of the Internal Revenue Code, applicability of a tax levy to property in the hands of another federal agency varied, based largely on the availability of common-law offset. Thus, for example, GAO had found a tax levy inapplicable to the current salary of a government employee. 26 Comp. Gen. 907 (1947); 23 Comp. Gen. 911 (1944). The

[90]Prior GAO and Treasury Department reports include Tax Administration: Collecting Federal Debts by Offsetting Tax Refunds, GAO/GGD-87-39BR (February 1987); Department of the Treasury, Financial Management Service, Federal Tax Refund Offset: Pilot Program 1986–1987 (July 1988).

[91]OMB, Management of the United States Government - Fiscal Year 1990, page 3-12.

[92]S. Rep. No. 420, 102d Cong., 2d Sess. 5 (1992), reprinted at 1992 U.S. Code Cong. & Admin. News 4304, 4308. This is the report of the Senate Governmental Affairs Committee on the Cash Management Improvement Act Amendments of 1992.

Internal Revenue Code of 1954 re-enacted the basic levy authority, and added what is now 26 U.S.C. § 6334(c), quoted above. This provision had the effect of nullifying the previously recognized exemptions, limiting them to those specified in section 6334(a). 49 Comp. Gen. 150 (1969); 36 Comp. Gen. 106 (1956). The revised section 6331(a) deals specifically with federal salaries, making the levy expressly applicable to "the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia."

In post-1954 decisions, the Comptroller General has consistently held that the levy authority applies to property in the hands of another federal agency, and that the agency in possession must therefore comply with a Notice of Levy served upon it by the IRS. 63 Comp. Gen. 498 (1984) (individual share of Indian judgment funds held by the Bureau of Indian Affairs); 49 Comp. Gen. 150 (1969) (savings deposits of military personnel stationed overseas); 38 Comp. Gen. 23 (1958) (postal savings accounts); 36 Comp. Gen. 106 (1956) (payments to military personnel upon discharge); B-177789, January 26, 1973 (Civil Service retirement annuities); B-156868, July 19, 1965 (cash deposit posted by contractor under timber sale contract); B-201511-O.M., April 8, 1981 (contract funds withheld under Davis-Bacon Act and determined payable to person against whose property IRS had levied). The test is a simple one:

> "[A]ll that is necessary to determine for the purposes of applicability of section 6331(a) is whether [the property in question is] 'property or rights to property' belonging to the delinquent taxpayer."

38 Comp. Gen. at 24. The courts are generally in accord. E.g., Expoimpe v. United States, 609 F. Supp. 1098 (S.D. Fla. 1985), upholding a tax levy against property which had been seized by the Drug Enforcement Administration. However, the levy authority has been held not to apply to Treasury checks in the hands of a depositary bank which had become a holder in due course. 54 Comp. Gen. 397 (1974).

The authority of 26 U.S.C. § 6331 applies to intangible property such as debts. United States v. Eiland, 223 F.2d 118, 121 (4th Cir. 1955). Under Treasury regulations, the obligation must be "fixed and determinable" in order to be subject to levy. However, this does not mean that it must be "beyond dispute and be calculated to the last penny." Reiling v. United States, 77-1 U.S.T.C. ¶ 9269 (N.D. Ind. 1977).

A GAO decision applying these concepts is B-217475, May 5, 1986. An individual had been retained as an independent contractor by the National Mediation Board to serve as an arbitrator. For several years, he had not submitted vouchers for his compensation and expenses. The IRS wanted to levy against this unpaid compensation. Without the vouchers, however, the Board had no way of determining what it owed the individual and its obligation therefore was not sufficiently "fixed and determinable" for tax levy purposes. If the individual should file a claim in the future that was supported by vouchers and not time-barred, the IRS could then seek to enforce any surviving lien it might have under 26 U.S.C. § 6321.[93]

The Supreme Court has characterized the tax levy as a "provisional remedy." United States v. National Bank of Commerce, 472 U.S. at 720. It "does not determine whether the Government's rights to the seized property are superior to those of other claimants; it, however, does protect the Government against diversion or loss while such claims are being resolved." Id. at 721. The Comptroller General has taken a similar view with respect to competing government claims. In a 1962 case, for example, the IRS had filed a levy with the State Department against moneys being withheld from a former employee. The Justice Department asserted a claim against the same funds to satisfy a fine resulting from a criminal conviction. GAO concluded that the funds should be applied first to satisfy the fine, which had been imposed prior to the assessment of the tax. "[T]here appearing to be no overriding equities, we perceive no reason why the monies due from the Government should not be applied with regard to the priority in time of the indebtedness." B-147557, January 2, 1962.

Whether a tax levy served on a federal agency is just another form of administrative offset or is a separate legal creature has produced a fair amount of litigation. The answer determines such things as the applicable jurisdictional statutes for challenging the levy/offset and the applicable statute of limitations. Thus far, the courts are divided. The majority view holds that a tax levy is not the same as a setoff. Capuano v. United States, 955 F.2d 1427 (11th Cir. 1992); Arford v. United States, 934 F.2d 229 (9th Cir. 1991); United Sand and Gravel Contractors, Inc. v. United States, 624 F.2d 733 (5th Cir. 1980). As the Capuano court put it, "If it is called a levy, and it acts like a levy, then it is a levy." 955 F.2d at 1431. In disagreement is United States ex rel. P.J. Keating Co. v. Warren Corp., 805 F.2d 449 (1st Cir. 1986), holding that the transfer of funds by another federal agency to

[93]A tax lien under 26 U.S.C. § 6321 survives as long as the underlying tax liability is enforceable. Id. § 6322.

the IRS is properly characterized as a setoff, even if it occurs under a formal notice of levy. The only GAO decision addressing the issue agrees with the First Circuit. 70 Comp. Gen. 41 (1990) (transfer by Government Printing Office to IRS of payments on contractor invoices submitted after receipt of notice of levy proper as a setoff).

7. Disposition of Amounts Set Off

How does an agency making an offset account for the amount recovered? There are three possibilities: (1) transfer the amount set off to the general fund of the Treasury as miscellaneous receipts; (2) transfer the amount set off to the credit of some other appropriation or fund; (3) take no action, with the result being that the amount of the setoff remains to the credit of the appropriation used to make the payment against which the debt was set off.

The rule is that a setoff must be accounted for in the same manner as if the debtor had made the payment directly. Whichever of the above three options would apply to a direct payment will apply as well to a setoff. In other words, for appropriations accounting purposes, there is no difference between a direct collection and a setoff.

Thus, if a debt represents tax indebtedness, the amount set off should be paid over to the Internal Revenue Service. See, e.g., B-189125, June 7, 1977; B-187903, December 21, 1976. Similarly, amounts set off against a final contract payment to satisfy a Labor Department claim under the Contract Work Hours and Safety Standards Act should be transferred to GAO for disposition in accordance with that statute. B-181695, April 7, 1975.

If the setoff is not payable to some other agency as in the above examples, again the rule is that the agency must account for the setoff as if the debtor had made the payment directly. Generally, this means that the agency must transfer the amount of the setoff to the Treasury as miscellaneous receipts unless there is statutory authority for retention of the funds, or unless the setoff constitutes a repayment to the appropriation. The agency may not retain the setoff if it would amount to an unauthorized augmentation of the agency's appropriations.

The Comptroller of the Treasury expressed the principle as follows:

"The amount of the claim of the Government against the railroad company for the value of a mule negligently killed is just as much a receipt when deducted from the claim of the railroad company as it would be if collected in cash from some party who had negligently

killed the mule and had no claim against the Government from which a set-off could be made. . . . The appropriation benefiting by the set-off should be charged with the amount of the set-off and miscellaneous receipts credited with a like amount."

20 Comp. Dec. 349, 351 (1913). See also 64 Comp. Gen. 395, 402 (1985); 52 Comp. Gen. 45 (1972); 19 Comp. Gen. 88, 90 (1939); 2 Comp. Gen. 599, 600 (1923); 22 Comp. Dec. 703 (1916); B-208064, November 15, 1983.

For a more recent illustration, when an agency sets off a debt owed by an insurance company against a subrogation award under the Federal Tort Claims Act, it cannot simply settle the claim for the difference. It must first settle the tort claim, then pay the net amount, if any, to the insurance company and transfer the amount of the setoff to miscellaneous receipts. B-135984, May 21, 1976.

Similarly, receipts collected by setoff from a common carrier for the value of government property lost or damaged in transit must be credited to miscellaneous receipts. 46 Comp. Gen. 31 (1966); 28 Comp. Gen. 666 (1949); B-4494, September 19, 1939. A narrow exception exists in cases where a single appropriation is involved and the freight bill on the shipment of the property lost or damaged exceeds the amounts paid for repairs. 21 Comp. Dec. 632 (1915), as amplified in 8 Comp. Gen. 615 (1929) and 28 Comp. Gen. at 667.

Where a debt is collected by setoff against retirement funds, the Office of Personnel Management pays over the amount of the setoff by check from the retirement fund to the agency that made the request. The requesting agency then must dispose of the funds in accordance with the above principles. 35 Comp. Gen. 38 (1955). If the requesting agency is no longer in existence, the check is sent to GAO for disposition. Id. at 39.

F. Statutes of Limitations

1. Limitations on Commencing a Lawsuit

The primary statute of limitations on the commencement of actions brought by the United States is 28 U.S.C. § 2415. Enacted in 1966, this was the first general statute of limitations on civil actions brought by the government. It is relevant to the administrative debt collection process because any referrals to the Justice Department for litigation must be

made in sufficient time to permit the filing of a lawsuit before the statute runs. The time periods in 28 U.S.C. § 2415 apply with respect to the types of actions specified unless there is some other more specific statute of limitations applicable to a particular case. The statute applies only to actions for money damages.

Subsection (a) of section 2415 covers contract actions. The limitation period for filing a complaint on "any contract express or implied in law or fact" is six years after the right of action accrues, or one year after the final decision in any applicable administrative proceeding required by contract or law, whichever is later.

The subsection contains a proviso which codifies the common-law principle that a later partial payment or written acknowledgement of a debt starts the time period running anew. The acknowledgement or partial payment may occur before or after the barring period initially expires. United States v. Glens Falls Ins. Co., 546 F. Supp. 643, 645 (N.D.N.Y. 1982).

Whether a partial payment will trigger this proviso depends on the intent of the debtor at the time of payment. The circumstances must permit the inference that the debtor recognizes the whole of the debt and intends to repay it. United States v. Glass Nursing & Convalescent Homes, Inc., 550 F. Supp. 1149, 1152 (S.D. Ohio 1982); Glens Falls Ins. Co., 546 F. Supp. at 645–46. In the latter case, a payment of less than the amount claimed, accompanied by a letter which clearly indicated that payment was being tendered in full satisfaction of the claim, was held not to constitute "partial payment" for purposes of re-starting the statute of limitations.

Subsection (b) provides a 3-year statute of limitations for tort actions brought by the United States (damage or injury from a wrongful or negligent act or omission). However, certain specified tort actions have a 6-year statute of limitations. These are: trespass on federal land; damages resulting from fire on federal land; conversion of federal property; and actions to recover for the diversion of money paid out under a grant program. An action to recover based on the misapplication of social security benefits has been held to be within the grant diversion exception and therefore subject to the 6-year limitation. United States v. Dimeo, 371 F. Supp. 95 (N.D. Ga. 1974).

Subsection (c) provides that 28 U.S.C. § 2415 shall not apply to actions to establish the title to, or right of possession of, real or personal property.

Subsection (d) provides a 6-year limitation period for actions to recover money erroneously paid to or on behalf of any civilian employee of the government or any member or dependent of the uniformed services. The payment must have been incident to the employment or service. As with the contract limitation discussed above, subsection (d) also provides that a later partial payment or written acknowledgement of the debt will start the clock running anew.

Subsection (e) deals with the recommencement of actions. Where an action has been dismissed without prejudice, the government may recommence the action within one year regardless of whether the action would then otherwise be barred. The defendant in a recommenced action may assert any claims which would not have been barred in the original action.

Subsection (h) excludes from the coverage of 28 U.S.C. § 2415 actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

Cases under 28 U.S.C. § 2415 often involve determining when the government's cause of action accrued. For example, under the student loan program, the cause of action accrues when the government pays the lender. United States v. Olavarrieta, 812 F.2d 640 (11th Cir. 1987), cert. denied, 484 U.S. 851; United States v. Tilleraas, 709 F.2d 1088 (6th Cir. 1983); United States v. Frisk, 675 F.2d 1079 (9th Cir. 1982); United States v. Bellard, 674 F.2d 330 (5th Cir. 1982).

For suits to recover overpayments to a provider under the Medicare program, the majority of courts hold that the 6-year statute of limitations under 28 U.S.C. § 2415(a) begins to run when the fiscal intermediary makes its final retroactive adjustment, thus fixing the exact amount of the overpayment. United States v. Hughes House Nursing Home, Inc., 710 F.2d 891 (1st Cir. 1983); United States v. Gravette Manor Homes, Inc., 642 F.2d 231 (8th Cir. 1981); United States v. White House Nursing Home, Inc., 484 F. Supp. 29 (M.D. Fla. 1979). The cases are not in total agreement, however, and some courts use the date of completion of the final audit. E.g., United States v. Pisani, 646 F.2d 83, 89 (3d Cir. 1981).

A 1971 GAO memorandum, B-158275-O.M., December 9, 1971, discussed the date of accrual in several contexts. In contract default cases, the limitation period begins to run from the date of breach. In an action to recover for delivery of defective goods, the limitation period would commence on the

date of delivery if the defects are apparent, and from the time of discovery if the defects are latent at the time of delivery. In actions to recover pension overpayments by the Department of Veterans Affairs, the limitation period runs from the date of discovery of the debtor's disqualification. The limitation on debt claims based on a veteran's indemnity obligation runs from the date the government reimburses the lending institution.

It is important to emphasize that 28 U.S.C. § 2415 does not cover all actions brought by the United States. As noted above, it is limited to suits to recover money damages and expressly excludes tax suits and suits to establish title to or possession of property. Apart from these express exceptions, must all other actions be squeezed into one of the covered categories (contract, tort, or money erroneously paid out)? In other words, is every action by the United States subject to some statute of limitations? In general, the answer is no. It has been held, for example, that certain actions founded on statute are not covered by any of the specified categories and hence are not subject to any limitation period. E.g., United States v. Lutheran Medical Center, 680 F.2d 1211 (8th Cir. 1982), aff'g 524 F. Supp. 421 (D. Neb. 1981) (suit under Hill-Burton Act to recover construction grant funds when facility was sold to profit-making organization); United States v. City of Palm Beach Gardens, 635 F.2d 337 (5th Cir. 1981) (facility constructed with Hill-Burton funds ceased to be used as community health center); B-179245-O.M., August 20, 1973 (action to recover statutory reenlistment bonus when payee failed to complete reenlistment term for which it was paid).

In addition, 28 U.S.C. § 2415 does not apply to an action by the United States to enforce a judgment. United States v. Hannon, 728 F.2d 142 (2d Cir. 1984) (default judgment); United States v. Kellum, 523 F.2d 1284 (5th Cir. 1975) (consent judgment); United States v. Johnson, 454 F. Supp. 762 (D. Idaho 1978) (default judgment).

There is language in a few cases to the effect that, for purposes of 28 U.S.C. § 2415, suits for damages by the United States must be characterized as sounding in either tort, contract, or quasi-contract. United States v. Limbs, 524 F.2d 799, 801 (9th Cir. 1975) (suit against employee for restitution of compensation benefits under Federal Employees Compensation Act held to be quasi-contractual and thus subject to 6-year limitation); United States v. Neidorf, 522 F.2d 916, 919 (9th Cir. 1975), cert. denied, 423 U.S. 1087 (suit to recover distributions to shareholders which rendered debtor

corporation insolvent). The extent of any real inconsistency between the two lines of cases has yet to be determined.

The typical statute of limitations contains various tolling provisions—periods of time that are to be excluded in computing the limitation period. The tolling provisions for 28 U.S.C. § 2415 are found in 28 U.S.C. § 2416. There are four general situations which will toll the limitation periods prescribed in section 2415: (a) defendant outside the United States; (b) defendant exempt from legal process because of infancy, mental incompetence, diplomatic immunity, or for any other reason; (c) material facts not known and could not reasonably be known by responsible government official; and (d) United States in declared state of war. In addition, section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. § 525, tolls the statute for periods of military service.

While 28 U.S.C. § 2415 is the most common statute of limitations on actions brought by the government, there are others dealing with specific situations. Some of them are:

- 31 U.S.C. § 3712(d): United States waives claim under dual compensation laws if claim has not been reported to GAO within six years from the last date of any period of dual compensation. (For implementing procedures, see Title 4 of GAO's Policy and Procedures Manual for Guidance of Federal Agencies.)
- 49 U.S.C. app. § 1502 note: 2-year statute of limitations on loss and damage claims resulting from international air transportation under Article 29 of the Warsaw Convention.
- 31 U.S.C. § 3731(b) (False Claims Act): Suit must be brought (1) within six years after the date of the violation, or (2) within three years after the date material facts were or reasonably should have been known by the responsible government official, but in no event more than ten years after the date of the violation, whichever occurs last.

2. Administrative Offset

Judicial offsets are covered by statute. Since its enactment, 28 U.S.C. § 2415 has expressly preserved the government's right to assert offsets and counterclaims in actions brought against it. Under 28 U.S.C. § 2415(f), in a suit against the United States, the United States may assert any claim arising out of the same transaction or occurrence (counterclaim). The United States may also assert, by way of offset, a claim not arising out of the same transaction or occurrence, even if time-barred, but the claim is

allowable only in an amount not in excess of the opposing party's recovery.

What about administrative offsets? Does the running of a statute of limitations on bringing lawsuits preclude subsequent administrative offset? As a general proposition, the answer is no, unless the statute expressly provides that running of the time period will extinguish the liability as well as bar the remedy of a lawsuit.

For example, 15 U.S.C. § 714b(c) imposes a 6-year statute of limitations on suits by or against the Commodity Credit Corporation. Expiration of the 6-year period does not bar the CCC from collecting debts by administrative offset. Doko Farms v. United States, 956 F.2d 1136 (Fed. Cir. 1992); United States v. Missouri Pacific R.R. Co., 250 F.2d 805 (5th Cir. 1958), cert. denied, 358 U.S. 821; Union Pacific R.R. Co. v. United States, 147 F. Supp. 483 (Ct. Cl. 1957), cert. denied, 353 U.S. 950. The Doko Farms court stated the rule as follows (956 F.2d at 1140):

"Courts have recognized and held that the fact that the statute of limitations bars a government suit to collect an amount due to it does not bar the government from invoking its administrative remedies to offset the indebtedness against other claims by the debtor."

Similarly, setoff against a contractor for violations of the Walsh-Healey Act (41 U.S.C. §§ 35–45) is proper even after expiration of the applicable 2-year period for filing suit (29 U.S.C. § 255). 33 Comp. Gen. 66 (1953). See also Unexcelled Chemical Corp. v. United States, 149 F. Supp. 383 (Ct. Cl. 1957); Ready-Mix Concrete Co. v. United States, 130 F. Supp. 390 (Ct. Cl. 1955); B-144604(1), December 18, 1961.

However, administrative offset after expiration of the statute of limitations in Article 29 of the Warsaw Convention is improper because Article 29 expressly provides that running of the 2-year period will extinguish the debt. 54 Comp. Gen. 633 (1975).

When the issue began to arise in the context of 28 U.S.C. § 2415, opinions split. GAO and one district court held that expiration of a period of limitations under section 2415 merely bars judicial enforcement but does

not preclude subsequent administrative setoff.[94] The Department of Justice and another district court concluded that offset was barred.[95]

Congress came to the rescue, at least in part, with two provisions of the Debt Collection Act of 1982. First, section 9 of the Debt Collection Act added a new subsection (i) to 28 U.S.C. § 2415:

"The provisions of this section shall not prevent the United States or an officer or agency thereof from collecting any claim of the United States by means of administrative offset, in accordance with section 3716 of title 31."[96]

However, Congress did not want to leave administrative offset open-ended. Therefore, it provided in section 10 of the Debt Collection Act that "no claim under this Act [Federal Claims Collection Act] that has been outstanding for more than ten years may be collected by means of administrative offset." This provision is codified at 31 U.S.C. § 3716(c)(1), which renders section 3716 inapplicable "to a claim under this subchapter that has been outstanding for more than 10 years."). Thus, administrative offset under 31 U.S.C. § 3716 is not affected by 28 U.S.C. § 2415, but now has its own 10-year statute of limitations.

The Federal Claims Collection Standards, in 4 C.F.R. § 102.3(b)(3), define "outstanding" in terms of when the government's right to collect the debt first accrued, and provide that the case law under 28 U.S.C. § 2415 should be used to determine the date of accrual. The Standards also incorporate the "knew or reasonably should have known" tolling provision of 28 U.S.C. § 2416, noted previously. See, e.g., 64 Comp. Gen. 395 (1985).

The next question is whether the 10-year limitation of 31 U.S.C. § 3716(c)(1) applies only to offset under the authority of 31 U.S.C. § 3716, or whether it applies to all administrative offsets, such as offset under 5 U.S.C. § 5514 or the various other offset statutes described previously in this chapter. Plausible arguments can be made both ways. On the one hand, it was enacted as part of section 3716 and, at least on its face, does not purport to affect any other statute. Following this approach, GAO

[94]58 Comp. Gen. 501 (1979); Atwater v. Roudebush, 452 F. Supp. 622 (N.D. Ill. 1976). See also Sidney B. Jacoby, The 89th Congress and Government Litigation, 67 Colum. L. Rev. 1212, 1231 (1967) ("The legislative history of the new 28 U.S.C. § 2415(f) makes it clear that the permissibility of making administrative setoffs remains unchanged.").

[95]Effect of Statute of Limitations on Administrative Collection of United States Claims, Op. Off. Legal Counsel, September 29, 1978, summarized in 58 Comp. Gen. 501, 503–04 (1979); Tomakin v. United States, No. C 75 1079 RHS (N.D. Cal. September 2, 1975) (unpublished order).

[96]Another statutory codification of the principle is 38 U.S.C. § 5314(c) (indebtedness under veterans' benefit programs).

concluded in 63 Comp. Gen. 462 (1984) that the 10-year limitation did not apply to offsets under 5 U.S.C. §§ 5705 and 5724(f).

Yet on the other hand, if all non-judicial offsets are varieties of administrative offset,[97] there is no logical reason why the 10-year period, like the due process procedures of section 3716,[98] should not apply to administrative offset under other statutes which do not contain their own limitation periods. Following this approach, the Office of Personnel Management has applied the 10-year limitation to offsets under 5 U.S.C. § 5514. 5 C.F.R. § 550.1106, added by 51 Fed. Reg. 21325, June 12, 1986. The Secretary of the Treasury has done the same thing under the Tax Refund Offset Program. 26 C.F.R. § 301.6402-6(c)(1). GAO has applied the OPM regulations without question. B-232454, September 1, 1989.

The question of taking administrative offset after expiration of a statute of limitations on bringing a lawsuit raised its head with increased vigor under the Tax Refund Offset Program, this time with a new twist. Under 31 U.S.C. § 3720A, "legally enforceable" debts may be reported to the IRS for potential offset. A number of student loan recipients[99] have argued that once the 6-year period for filing suit has expired, the debt is no longer "legally enforceable" for purposes of the offset program. Thus far, the courts have uniformly rejected this argument, holding that expiration of the statute of limitations bars a lawsuit but does not preclude subsequent administrative offset. Grider v. Cavazos, 911 F.2d 1158 (5th Cir. 1990);[100] Jones v. Cavazos, 889 F.2d 1043 (11th Cir. 1989); Thomas v. Bennett, 856 F.2d 1165 (8th Cir. 1988); Roberts v. Bennett, 709 F. Supp. 222 (N.D. Ga. 1989); Gerrard v. United States Office of Education, 656 F. Supp. 570 (N.D. Cal. 1987).[101] Cf. Swaney v. Secretary of Education, 664 F. Supp. 172, 177 (D. Del. 1987) (court found that government's position had a "reasonable basis in law" for purposes of an attorney's fee petition under the Equal Access to Justice Act).

[97]E.g., 64 Comp. Gen. 142 (1984); 5 C.F.R. § 550.1102(b).

[98]64 Comp. Gen. 142 (1984).

[99]For some reason, the cases thus far have all involved defaulted student loans. Perhaps one should be gratified in some small way that the recipients are at least learning their way to court.

[100]As Grider illustrates, there is disagreement over how to apply the 10-year limitation on administrative offset, but there is no disagreement on the basic proposition for which we cite the case.

[101]Language in Hurst v. U.S. Dep't of Education, 695 F. Supp. 1137, 1139 (D. Kan. 1988) could be used to support a contrary proposition, but the offset in that case was made within the 6-year lawsuit period. A separate issue in Hurst was appealed and affirmed in 901 F.2d 836 (10th Cir. 1990).

G. Deceased Debtors

It should be apparent that many of the collection tools we have been discussing throughout this chapter will be of little value against a deceased debtor. If a debtor is deceased, the government may be able to collect from the estate or from a distributee of property from the estate. However, different rules and procedures come into play. This section will attempt to describe some of them.

The key statute to be aware of is 31 U.S.C. § 3713. Subsection (a) gives priority to claims of the United States when "the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor." In other words, if the estate is insolvent (insufficient assets to pay all claims), a claim of the United States must be paid first. The statute is, as one court has put it, "remarkably straightforward and free from significant ambiguity." Carter v. Carter, 681 F. Supp. 323, 326 (E.D. Va. 1988).

Subsection (b) gives real teeth to the priority. It provides that a personal representative of an estate (executor, administrator, etc.) who pays other debts owed by the decedent before paying debts owed to the United States will be personally liable to the extent of the unpaid government claims.[102] This means exactly what it says. Thus, an executor of a Texas estate who paid the state inheritance tax before paying the federal estate tax was found personally liable for the outstanding federal tax. United States v. Blakeman, 750 F. Supp. 216 (N.D. Tex. 1990).

This statute was not part of the Federal Claims Collection Act of 1966 or the Debt Collection Act of 1982. In fact, 31 U.S.C. § 3713 is one of the oldest federal statutes on the books. The priority portion was originally enacted in 1797 (1 Stat. 515). The personal liability portion was added two years later, in 1799 (1 Stat. 676). A capsule history may be found in United States v. Moore, 423 U.S. 77, 80–82 (1975).

The purpose of 31 U.S.C. § 3713 is a simple one: to aid in raising revenue to help support the operations of the government. United States v. State Bank of North Carolina, 31 U.S. (6 Pet.) 29, 35 (1832). As such, it is to be construed liberally to serve that purpose. United States v. Emory, 314 U.S. 423, 426 (1941); In re Kuhn's Estate, 21 A.2d 513 (Pa. Super. Ct. 1941). Its constitutionality against challenges of interference with state sovereignty

[102]In addition to deceased debtors, 31 U.S.C. § 3713 also applies to insolvency of a living debtor in certain circumstances, except for cases under the Bankruptcy Code. We are limiting our coverage to deceased debtors, although a few of the cases cited for the more general propositions are insolvency cases.

has long been settled. United States v. Fisher, 6 U.S. (2 Cranch) 358, 395-96 (1805) (Chief Justice Marshall); In re Kuhn's Estate, 21 A.2d at 514–15.

Debts for purposes of 31 U.S.C. § 3713 are not limited to debts which are delinquent or past due, or even currently payable. The Supreme Court stated, in United States v. State Bank of North Carolina, 31 U.S. at 36:

"What debt is here referred to? A debt which is then actually payable to the United States? Or a debt then arising to the United States, whether then payable, or payable only in futuro? We think the latter is the true construction of the term of the act."

See also Leggett v. Southeastern People's College, 234 N.C. 595, 68 S.E.2d 263, 267 (1951) (term merely "denotes a state of indebtedness").

Debts for purposes of 31 U.S.C. § 3713 clearly embrace federal income taxes. Viles v. Commissioner, 233 F.2d 376, 379 (6th Cir. 1956); United States v. Weisburn, 48 F. Supp. 393, 396 (E.D. Pa. 1943); In re Kuhn's Estate, 21 A.2d at 515. In fact many of the cases under section 3713 have involved tax claims. E.g., Meyerson v. Council Bluffs Savings Bank, 824 F. Supp. 173 (S.D. Iowa 1991) (tax lien given priority over claim of former spouse for unpaid alimony); Westmoreland v. Westmoreland, 716 F. Supp. 217 (D.S.C. 1988) (tax claim entitled to priority over prior recorded judgment lien).

The United States does not have priority under section 3713 over funeral expenses and expenses of administration of the estate. This is because these are debts of the estate and not of the decedent. Weisburn, 48 F. Supp. at 397; Martin v. Dennett, 626 P.2d 473 (Utah 1981); In re Henke's Estate, 39 Misc. 2d 705, 241 N.Y.S.2d 788 (Sur. Ct. 1963). However, the United States does have priority over the expenses of the decedent's last illness because they would have been liabilities of the decedent had he or she survived. Estate of Shoptaw, 54 Wash. 2d 602, 343 P.2d 740 (Wash. 1959); Estate of Muldoon, 128 Cal. App. 2d 284, 275 P.2d 597 (Cal. Dist. Ct. App. 1954).

For purposes of personal liability under 31 U.S.C. § 3713(b), the amount of the government's claim need not have been definitely determined at the time the estate assets were distributed. United States v. Purdome, 240 F. Supp. 221, 223 (W.D. Mo. 1963). If an estate is solvent at the time of death but later becomes insolvent, the statute applies, but one court has held that personal liability will attach only to the extent of post-insolvency distributions. Schwartz v. Commissioner, 560 F.2d 311 (8th Cir. 1977).

Thus, the United States has a statutory right to have its claims paid before other debts of the decedent, and has the imposing threat of personal liability to enforce this right. We next consider how the government goes about asserting its priority.

Many decedents' estates will have to pass through some form of probate. There is no such thing as federal probate law. Probate is a creature of state law. Thus, probate rules and procedures can and do vary from state to state. State law commonly includes a statute of limitations on filing claims with the probate court. For openers, it is clear that state statutes of limitations do not apply to the federal government. State law cannot invalidate a claim of the United States. United States v. Summerlin, 310 U.S. 414 (1940); United States v. Vibradamp Corp., 257 F. Supp. 931 (S.D. Cal. 1966); United States v. Gibson, 101 F. Supp. 225 (D. Idaho 1951); United States v. Luce, 78 F. Supp. 241 (D. Minn. 1948); United States v. Anderson, 66 F. Supp. 870 (D. Minn. 1946).

The United States has an option. It may file and prosecute its claim in the probate court the same as any other creditor. Alternatively, it may simply notify the personal representative of its claim and otherwise ignore the probate proceedings, leaving it to the personal representative (under the spectre of personal liability) to preserve the government's priority. Vibradamp, 257 F. Supp. at 937; Luce, 78 F. Supp. at 243–44; 58 Comp. Gen. 778 (1979).

If the United States chooses to pursue the probate proceedings, it will be bound by the state court's determination. For example, in United States v. Pate, 47 F. Supp. 965 (W.D. Ark. 1942), the government filed a formal proof of claim. The probate court assigned it a low priority. The government did not appeal the probate court's determination, but instead filed suit to hold the administrator personally liable. Can't do it, held the court.

> "Had the Government seen fit to do so, it could have held aloof from said proceedings and given the administrator notice of its claim, and then he, at his peril, would have been bound to see that the priority rights of the Government were fully protected. . . . But it saw fit to pursue another course, and to submit its claim against the Meadors estate to the Probate Court of Howard County, a court having jurisdiction to administer said estate; and, having done so, it is bound by the judgment of said Court." Id. at 968.

If the government chooses to avoid probate and instead serve notice on the personal representative, the notification should obviously be in

writing, and should assert the priority and cite 31 U.S.C. § 3713. See B-212728, August 27, 1984 (non-decision letter).

As a general proposition, if the government notifies the personal representative of its claim, or if the estate otherwise has actual knowledge, the government will be able to enforce personal liability against the representative. The facts that all assets have been distributed, the estate has been closed and the personal representative discharged are irrelevant. United States v. Boots, 675 F. Supp. 550 (E.D. Mo. 1987); Vibradamp, 257 F. Supp. at 937; Gibson, 101 F. Supp. at 227; Luce, 78 F. Supp. at 243; United States v. Munroe, 65 F. Supp. 213 (W.D. Pa. 1946); United States v. Fisher, 57 F. Supp. 410 (E.D. Mich. 1944). Some of the cases (Fisher for example) indicate that the government can also recover from persons to whom the assets have been distributed.

What if the United States does absolutely nothing until the estate has been closed and the assets distributed? The cases are divided. Vibradamp held that the United States cannot recover from either the personal representative or the distributees. The government may have an option, but it must actually exercise it and follow one of the alternatives. However, other courts have held that the United States can still recover from the distributees. United States v. Snyder, 207 F. Supp. 189 (E.D. Pa. 1962); United States v. Anderson, 66 F. Supp. 870 (D. Minn. 1946). See also B-136335, August 18, 1958; B-130974, June 4, 1957. (Personal liability of the executor or administrator was not an issue in Snyder and Anderson because the estates in those cases were not insolvent.)

If a personal representative is liable under 31 U.S.C. § 3713(b), the United States can collect by administrative offset should the opportunity present itself. In 10 Comp. Gen. 425 (1931), for example, the Comptroller General held that a government claim against an executrix could be set off against moneys payable to her under private relief legislation. Should a similar situation arise today, the offset would be accomplished under 31 U.S.C. § 3716. And, if the fiduciary should die before paying the government an amount owed under 31 U.S.C. § 3713(b), the government's claim survives against the fiduciary's estate. King v. United States, 379 U.S. 329, 330 n.1 (1964).

A GAO decision, 58 Comp. Gen. 778 (1979), illustrates many of the principles noted in this section. The debtor, a Wisconsin domiciliary who had received overpayments of Supplemental Security Income benefits, died without repaying the debt. The agency did not file a claim with the

Wisconsin probate court, but did notify the estate's attorney, who indicated that the decedent's daughter, one of the distributees, would pay the claim after the estate was closed. Once the estate was closed and the assets distributed, the daughter argued that she should not be held liable because the government had failed to participate in the formal probate proceedings. GAO concluded that the government had acted properly and was entitled to recover the debt, which was otherwise undisputed, from the decedent's daughter. Wisconsin law provided that its probate filing requirements did not apply to claims by the United States, but the result would have been the same even without such a provision.

H. Liability of Government Employee for Loss Resulting From Error or Neglect of Duty

Federal employees may find themselves indebted to the government not only by receiving overpayments of various types, but also by causing the government to suffer losses due to their error, mistake in judgment, or neglect of duty. For losses in this latter category, there is a distinction, and a corresponding difference in standards of accountability, between funds and other types of property (although money is concededly a form of "property"). E.g., B-167126, August 28, 1978; B-151156, December 30, 1963. Accountability for funds is strict and is discussed in detail in Chapter 9; this section addresses accountability in situations not governed by the "accountable officer" laws—losses of property other than funds and losses attributable to employees who are not accountable officers.

The following examples will illustrate the variety of contexts in which the problem may arise:

- Example 1: John Q. Bureaucrat is given a General Services Administration motor pool vehicle to use on some official business. Instead of proceeding directly to his destination, he stops at his favorite watering hole for some liquid refreshment. Pleasantly stimulated by the diversion, he returns to the car and proceeds to ram it into a telephone pole.
- Example 2: John Q. is assigned some dictating equipment for use in his work. When he goes home for the night, he leaves it out on top of his desk in an unlocked office, instead of securing it in a locked desk or filing cabinet. The next morning, it is gone.
- Example 3: John's new job is processing payment vouchers. He inadvertently misplaces some invoices under a pile of unpaid traffic tickets, and the resulting delay in payment causes the government to lose a prompt payment discount.

The question in all of these examples is the same: To what extent can the government recoup its losses from John Q's pocket?

At the outset, it is important to distinguish the employee's potential liability to the government from the government's liability under the Federal Tort Claims Act. Suppose in our first example that John ran into another vehicle instead of the telephone pole and the owner of that vehicle, a private citizen, filed a claim under the Federal Tort Claims Act. If John's agency paid the tort claim, it could not recoup from John. However, there would still be the question of liability for the damage to the government car. That is what we are concerned with here.

Before discussing monetary liability, we should point out that the agency can always consider non-pecuniary sanctions in the form of "adverse actions"—firing, suspension, demotion, etc. This was summarily recognized in a very early decision, A-25502, February 2, 1929, again in 25 Comp. Gen. 299, 301 (1945) and 45 Comp. Gen. 447, 450 (1966), and discussed in more detail in B-125045-O.M., June 29, 1977.

Turning to pecuniary liability, the first question to ask is whether the agency has any specific statutory direction in this area. Most agencies do not, but a few do. For example, in the Army and Air Force, pecuniary liability for the loss, damage, or destruction of government property is assessed by means of the "Report of Survey." 10 U.S.C. § 4835 (Army); 10 U.S.C. § 9835 (Air Force). This is an official investigation conducted by military personnel in accordance with regulations of the particular service.

The Report of Survey has been used to assess liability for such things as damage to a government-owned motor vehicle (B-135297, March 28, 1958) and the disappearance of two cases of sunglasses due to negligence by supply personnel (B-192609, September 18, 1978). The Report of Survey statutes apply to civilian employees as well as military personnel. B-154960, August 27, 1964. As the three cases cited in this paragraph point out, determinations resulting from a Report of Survey are final, except for any possible judicial review, and not subject to review by GAO.

If a member of the Army or Air Force damages "arms or equipment" by abuse or negligence, the amount of the damage may be deducted from current salary. 37 U.S.C. § 1007(e). See 51 Comp. Gen. 226 (1971).

However, as noted, most agencies have no similar statutory direction. Absent statutory direction one way or the other, the rule is this: There is no authority to assess pecuniary liability against a government employee for losses resulting from error in judgment or neglect of duty unless the agency has issued regulations specifically providing for such liability. Restating the rule from a different perspective, a government employee may be held liable for losses resulting from his or her error or neglect if and to the extent the agency has issued regulations to that effect. The regulations serve to put the employee on notice of the potential liability.

The earliest published decision spelling out the rule is 25 Comp. Gen. 299 (1945). In that case, the Comptroller General held that since the (then) National Housing Agency had not promulgated administrative regulations, it could not set off against the retirement accounts of two employees a loss it suffered by virtue of the employees' failure to have certain property properly surveyed.

The concept arose again in 26 Comp. Gen. 866 (1947), in which a Commerce Department employee ordered fuel in violation of established procurement procedures, as a result of which the vendor billed the government in excess of the amount authorized under the General Supply Schedule. Since the employee had exceeded his authority, the government was not liable for the excess amount. As to the potential liability of the employee, the Comptroller General said that this was a matter to be resolved between the employee and the vendor. If, under the rule of 25 Comp. Gen. 299, the employee could not be charged for losses to the government in the absence of regulations, it followed that the government could not force the employee to pay for a loss sustained by a third party.

The rule has been applied to bar recovery from an employee for a loss due to the negligent failure to take advantage of a prompt payment discount. 45 Comp. Gen. 447 (1966). However, an employee could be subjected to liability for this type of loss if the agency had so provided by regulation. See A-25502, February 2, 1929. GAO further pointed out that certifying a voucher in the full amount within the discount period could subject the certifying officer to liability under 31 U.S.C. § 3528(a). 45 Comp. Gen. at 450.

Two early decisions affirmed the government's right of setoff against retirement funds in cases where the agency had regulations providing for employee liability. 5 Comp. Gen. 932 (1926) (negligent damage to Post Office truck); 3 Comp. Gen. 878 (1924) (Bureau of Printing and Engraving regulations assessing liability for excess spoilage). For other cases

discussing or applying the rule, see 52 Comp. Gen. 964, 967 (1973); 32 Comp. Gen. 332 (1953); A-31814, May 29, 1930.[103]

Naturally, there are limits beyond which, with or without regulations, an employee may not escape the consequences of his or her own carelessness. Thus, for example, the rule of 25 Comp. Gen. 299 has been held not to apply to a situation where excess travel or transportation expenses result solely from the traveler's negligence. 34 Comp. Gen. 640 (1955).

In cases involving loss or damage to items of personal property, the legal basis for liability is the concept of bailment, under which a person with custody of property is liable for loss or damage due to ordinary negligence (lack of reasonable care under the circumstances). B-180160-O.M., March 18, 1974. Since the liability in the context of government employees is imposed by regulation, however, the agency can, in its discretion, apply a lesser standard (e.g., gross negligence) or a stricter one. GAO has cautioned that too strict a standard would not be wise. Id. Most reasonable people can understand having to bear the consequences of their own negligence. A stricter standard, however, apart from basic fairness, could adversely affect both employee morale and work productivity, since employees may well refuse to accept items of equipment for which they may be held strictly liable.

Assessing negligence in cases involving loss or damage to items of office equipment (calculators, personal computers, dictating equipment, etc.) often boils down to questions of physical security. An employee has an obligation to take reasonable precautions to safeguard government property entrusted to his or her custody. What is adequate, however, depends on the circumstances. You cannot, for example, be faulted for not locking your office if you work in a cubicle without a door. The rule, to the extent one can be said to exist, is "you do the best you can with what is available to you." In addition, common sense dictates that employees should bring security weaknesses to the attention of appropriate supervisory personnel. If, for example, you request some sort of anchoring device for a personal computer and the agency fails to provide it, it is not your fault. An internal GAO memorandum discussing employee liability for loss of computer equipment is B-180160-O.M., October 15, 1985.

[103]Any discussion in pre-1972 cases of surety bonding of employees is now obsolete in light of 31 U.S.C. § 9302.

Employees against whom liability has been assessed occasionally ask GAO to review their cases. GAO will do so under its general claims settlement statute (31 U.S.C. § 3702(a)), but will apply a narrow standard of review. GAO will review basically two things: the agency's legal basis for assessing liability (i.e., the existence of statutory authority or appropriate regulations) and whether the agency has followed its own regulations. GAO will not second-guess the agency's determination that a given set of facts constitutes negligence unless the finding can be said to lack a rational basis. 65 Comp. Gen. 177, 179–80 (1986). See also B-212502, July 12, 1984; B-208108, July 8, 1983.

For example, in a 1982 case, a Forest Service employee was driving a leased vehicle on official business. The vehicle was damaged as a result of the employee's negligence in (a) leaving the vehicle unattended with the motor running, and (b) failing to set the parking brake in disregard of a memorandum which had advised that vehicles of that particular make had a tendency to jump from "park" into "reverse" gear. GAO found that the Forest Service acted properly in assessing pecuniary liability against the employee pursuant to its regulations. B-202807, March 25, 1982.

In a 1981 case, GAO considered a variation on the theme of employee liability. The Army proposed a program under which a member who lost, damaged, or destroyed an item of government property issued to him or her would be permitted to purchase a replacement at an Army Self-Service Supply Center for a sum equivalent to the value of the depreciated item. The difference between the purchase price of the replacement item and the amount paid by the individual soldier would be charged to appropriated funds. The Comptroller General found the proposal legally unobjectionable, but cautioned that the Army should establish adequate fund control procedures to ensure that the "automatic obligation" feature of the program would not violate the Antideficiency Act, 31 U.S.C. § 1341. The Comptroller General also found that the use of appropriated funds to pay the "depreciation allowance" would not constitute an unauthorized diversion of the funds from their intended purpose in violation of 31 U.S.C. § 1301(a), since the Army's appropriations were available to acquire replacement property. 60 Comp. Gen. 688 (1981).

Liability for damage to General Services Administration fleet management system (motor pool) vehicles is covered by regulation. 41 C.F.R. Subpart 101-39.4. If the damage is attributable to misconduct or negligent or improper operation by a government employee, GSA will charge the repair or replacement costs to the employing agency. The Comptroller General

upheld the validity of these regulations in 59 Comp. Gen. 515 (1980). If the damage is not the employee's fault and the responsible party can be reasonably identified, GSA will absorb the cost or try to recover from the responsible party. The regulations specify that each agency is responsible for disciplining its employees who are guilty of damaging GSA vehicles through negligence or misconduct. 41 C.F.R. § 101-39.406(c). Under the rule of 25 Comp. Gen. 299, if an agency issues regulations to that effect, the forms of discipline could include pecuniary liability. See, e.g., A-31814, May 29, 1930.

One issue that has received little attention in the decisions is how to determine the amount of damages to charge the employee. Presumably, the agency can use any of the "standard" methods of computing damages—cost of repairs, value of item at time of loss less salvage value, etc. See 60 Comp. Gen. 688 (1981); 15 Comp. Gen. 927 (1936).

Once liability has been assessed, the agency should then proceed to collect in accordance with the legal authorities available to it as described elsewhere in this chapter. Since most forms of involuntary collection require varying types of due process procedures, agencies should integrate their procedures as much as they can to avoid duplication.

I. Right of Redemption and Release of Lien

1. Government's Right of Redemption

The United States may acquire liens to real property in many ways. A major source is the tax lien (26 U.S.C. § 6321). Also, the government may acquire a lien by virtue of paying a loss to a lender under an insured or guaranteed loan program. E.g., 36 Comp. Gen. 697 (1957). A lien may also result from the nonpayment of a criminal fine. E.g., B-100584, April 6, 1951.

Where the United States is a junior lienholder to real property, it may have the right of redemption to protect its interest against a senior lien. In this connection, 28 U.S.C. § 2410(c) provides in part:

"Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of the sale within which to redeem . . . ."

Also, the right of redemption may be granted by state law.

There are statutory exceptions to the one-year right of redemption provided by 28 U.S.C. § 2410(c). For example, the statute itself further provides that the redemption period for a tax lien shall be 120 days or the period allowed by state law, whichever is longer. Federal tax liens are governed by detailed provisions of the Internal Revenue Code. The statute also refers to two other exceptions found elsewhere in the U.S. Code. The right to redeem provided by 28 U.S.C. § 2410(c) does not apply where the government's lien derives from (1) the issuance of insurance under the National Housing Act (12 U.S.C. § 1701k), or (2) a loan guaranteed or insured by the Department of Veterans Affairs (38 U.S.C. § 3720(d)).

At one point, based on the statutory context, the Comptroller General had expressed the view that the right of redemption under 28 U.S.C. § 2410(c) relates only "insofar as foreclosure sales are concerned, to such sales made pursuant to judicial action in a judicial proceeding, and not to a foreclosure sale made under a power of sale in a deed of trust without a judicial proceeding." B-100584, April 6, 1951. A later judicial opinion, however, concluded that the United States (with a junior lien) also has a right to redeem under 28 U.S.C. § 2410(c) when the superior lien has been foreclosed by a nonjudicial sale. United States v. Boyd, 246 F.2d 477 (5th Cir. 1957), cert. denied, 355 U.S. 889. If the right to redeem applies to a foreclosure of a superior lien by nonjudicial sale, it would logically apply also to a foreclosure by judicial sale where the United States, as junior lienholder, was not made a party to the action. B-169602, June 30, 1970 (non-decision letter).

In a number of cases, the purchaser at a foreclosure sale has asked GAO to release the government's right of redemption under 28 U.S.C. § 2410(e), discussed below. Whether the right of redemption under 28 U.S.C. § 2410(c) qualifies as a "lien" for purposes of release under section 2410(e) is not clear. The cases have all been decided on some other basis, usually that the applicant is the owner of the property rather than a senior lienholder. E.g., B-194391, July 16, 1979. From this perspective, the issue seems largely moot.

In any event, there may be other ways for a purchaser to remove the government's right of redemption, depending on the program agency's statutory authority. For example, in B-194391, July 16, 1979, the Comptroller General noted that the Small Business Administration has discretionary authority by statute to sell or otherwise dispose of claims or

security, and to collect or compromise obligations. Under this authority, SBA could accept a monetary payment in exchange for the release of its right of redemption. In effect, SBA could "sell" its right of redemption to the owner of the property. See also B-141234-O.M., March 10, 1960.

As noted above, a right of redemption may exist by virtue of state law. A statute which bars rights of redemption under 28 U.S.C. § 2410(c) does not bar similar rights arising under state law. Thus, in one case the Federal Housing Administration had a right of redemption under state law even though the application of 28 U.S.C. § 2410(c) was expressly prohibited by 12 U.S.C. § 1701k. The Comptroller General held that FHA could expend Title I funds to redeem the property if redemption was determined to be in the best interests of the government and necessary to carry out the provisions of Title I. 36 Comp. Gen. 697 (1957).

Even assuming that a right of redemption under 28 U.S.C. § 2410(c) is a lien for purposes of the Comptroller General's release authority in section 2410(e), the Comptroller General has no authority to release or otherwise waive a right of redemption arising under state law. B-165746, December 26, 1968.

Whether the right of redemption stems from 28 U.S.C. § 2410(c) or from state law, the agency, before exercising it, must have appropriations available for that purpose. Indeed, the Supreme Court has noted that the purpose of the one-year period in 28 U.S.C. § 2410(c) is to give the agency involved sufficient time to obtain appropriations to protect the government's interests. United States v. John Hancock Mutual Life Ins. Co., 364 U.S. 301, 306 (1960). Absent a specific appropriation, the availability of appropriations is determined by applying the "necessary expense" concept developed under 31 U.S.C. § 1301(a). 36 Comp. Gen. 697 (1957); 34 Comp. Gen. 47 (1954). For example, in A-42511, August 24, 1932, GAO concluded that the Internal Revenue Service could charge redemption expenses to its appropriation for collecting the internal revenue, since the sole purpose of exercising the right in that case was to effect the collection of taxes due the United States.

2. Release of Junior Lien

If the United States holds a junior lien, other than a tax lien, to any real or personal property, the Comptroller General is authorized to issue a certificate releasing the property from the lien. 28 U.S.C. § 2410(e). The statute prescribes the procedures to follow in obtaining a release, and the

requirements which must be met as a prerequisite to invoking the statute. Those requirements are:

(1) The applicant for the release must be a senior lienholder and must apply in writing to the officer responsible for the administration of the laws giving rise to the government's lien.

(2) The applicant's lien must be duly recorded in the jurisdiction in which the property is located.

(3) The government's lien must be junior to the applicant's lien, and must not be a tax lien.

(4) The officer to whom the application is made must find and report to the Comptroller General that the proceeds from the property's sale would be insufficient to wholly or partly satisfy the lien, or that the government's claim has been satisfied or that it is no longer enforceable because of lapse of time or for some other reason.

Thus, the sequence is: applicant applies in writing to program agency; program agency makes required findings; program agency reports findings to Comptroller General. The statute does not authorize GAO to cancel a lien generally, only to release it with respect to specific real or personal property. A-81605, November 25, 1936.

Issuance of a certificate of release is not an absolute right, but is contingent on compliance with the statutory conditions. Thus, all of the above conditions must be met in order for a release to be issued. E.g., 58 Comp. Gen. 732 (1979); 30 Comp. Gen. 268 (1951); 17 Comp. Gen. 180 (1937).

Most requests under 28 U.S.C. § 2410(e) have been denied, invariably because of noncompliance with one or more of the statutory conditions. The most common situation involves a request by the fee simple owner of the property, who usually bought it at a foreclosure sale. The owner of the property is not a lienholder and therefore does not qualify under the statute to obtain a certificate of release. For example, in 58 Comp. Gen. 732 (1979), the applicant was an individual who had purchased the property at a foreclosure sale and was concerned because the United States had an outstanding unsatisfied judgment against one of the former owners. Although it was doubtful whether, under state law, the United States actually had a lien, the release could not be granted in any event

because the applicant was the owner of the property rather than a senior lienholder.[104]

Failure to serve notice of the foreclosure proceeding on the United States, as required by 28 U.S.C. § 2410(b), does not affect the owner's status as owner for purposes of entitlement to a certificate of release under subsection (e). B-178601, December 13, 1973.

Not only must the statutory conditions be met, they must continue to exist up to the time the release is issued. An intervening change in the conditions may operate to disqualify an applicant. Thus, a senior lienholder who acquires fee simple title to the property before the release is issued thereby loses eligibility as an applicant. 17 Comp. Gen. 180 (1937); B-194391, July 16, 1979; B-165746, December 26, 1968.

The requirement that the applicant be a senior lienholder would seem to be the most substantive of the conditions. Some of the other conditions tend to be more procedural, for example, the requirement that the program agency report its findings. Be that as it may, all of the conditions, including the procedural ones, must be satisfied before the release may be issued. While it seems clear that the absence of any of the conditions would be sufficient for the Comptroller General to decline to issue the release, the cases that have arisen so far tend to combine a procedural deficiency with one or more substantive failures. See, e.g., B-178601, June 4, 1973; B-162827, December 4, 1967; B-152569, October 21, 1963; B-147347, October 11, 1961. Deficiencies which are purely procedural can presumably be cured and the request resubmitted.

Where all of the statutory conditions have been met, the Comptroller General will issue the certificate of release. In B-180526, April 3, 1974, the applicant, who held a senior mortgage on real property on which the Federal Housing Administration held a junior deficiency judgment lien, desired to extinguish the government's junior lien before foreclosing. FHA found that there were two additional senior liens on the property, and that the sum of the three senior liens was approximately three times the fair market value of the property. Based on this, FHA found that sale of the property would not produce sufficient proceeds to wholly or partly satisfy

[104]Other cases holding that the Comptroller General is not authorized under 28 U.S.C. § 2410(e) to issue a certificate of release at the request of the owner of the property include 30 Comp. Gen. 268 (1951); B-214696, May 1, 1984; B-178601, June 4, 1973, aff'd upon reconsideration, B-178601, December 13, 1973; B-173705, January 17, 1972; B-152569, February 17, 1964; B-152569, October 21, 1963; B-147347, October 11, 1961; B-125310, October 14, 1955.

the government's lien, reported its findings to the Comptroller General, and the Comptroller General issued the certificate of release.

Certificates of release were also issued in B-158387, February 9, 1966, and B-146068, June 21, 1961. In both of those cases, as in B-180526, it was found that the outstanding senior liens exceeded the fair market value of the property. Fair market value may be derived from appraisals. B-158387, cited above. An earlier case granting a release is B-111161, April 16, 1953.

The nature of the government's junior lien, so long as it is not a tax lien,[105] does not affect the availability of the release under 28 U.S.C. § 2410(e). Thus, the Comptroller General may release the lien whether it arose by judgment, as in B-180526, or otherwise, as in B-158387 and B-146068.

A 1935 case, A-67909, December 2, 1935, specified the documents the agency should submit in requesting the certificate of release. In addition to the senior lienholder's initial application, the "ideal" package should include:

- A statement of the nature of the proceeding out of which the lien of the United States arose, including court record references.
- A description of the property, including plat record references. (This should be taken from a deed or document containing a similar description, as this is the description GAO will use on the certificate.)
- A certificate of the tax assessor, or other officer having custody of such records, as to the assessed value of the property for two taxable years, including the current taxable year.
- The opinion of the trust officer or real estate officer of a bank, trust, or title company, or a recognized appraiser as to the market value of the property. If neither of these is available, the statement of a local real estate dealer or broker as to the value should be furnished.
- A definite finding by the requesting agency as to the present market value of the property, the amount of the debt secured by the senior lien, and whether the lien of the United States has been satisfied or, by lapse of time or otherwise, has become unenforceable.

As a practical matter, GAO will not insist on rigid compliance with this listing, and will accept "substantial compliance" as long as what is submitted is sufficient to enable GAO to independently verify that the statutory conditions are satisfied. In addition, A-67909 said that GAO would

[105]As noted earlier, the statute expressly excludes tax liens. See, e.g., B-208277, September 7, 1982 (non-decision letter). Tax liens have their own procedures, governed by the Internal Revenue Code. E.g., 26 U.S.C. § 6325.

require the originals of all documents and supporting papers. GAO does not insist on this either.

Three cases arising in the late 1980s in which the Comptroller General issued certificates of release illustrate the kinds of situations in which 28 U.S.C. § 2410(e) has been invoked:

- B-226839, June 15, 1987. Government's lien arose from criminal penalties imposed by judgment. Senior lien was a pre-existing mortgage held by a bank.[106]
- B-230612, March 25, 1988. Government's lien arose from money judgment obtained by Department of Labor under Fair Labor Standards Act. Bank holding pre-existing mortgages was the senior lienholder.
- B-235853, August 14, 1989. Government's lien was a judgment for the balance due on a student loan. Debtor was making installment payments on a house under a contract for deed. The contract seller's interest was the senior lien. Release of the government's lien was necessary so that debtor could convey clear title to his interest under the contract.

[106]Prior to this case, it was GAO's practice to issue a formal decision along with the certificate. Commencing with B-226839, GAO changed its procedure and now issues the certificate accompanied by a simple transmittal letter. The letter itself includes very little information, with somewhat more detail on the certificate itself.